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PREFACE TO THE EIGHTH EDITION

THE very favourable reception that was accorded to the Seventh Edition of *Slater's Mercantile Law* (containing as it did several departures from the old style of legal textbooks), and the support of numerous friends of wide experience in the teaching of commercial law, have encouraged the editors to add another feature to the work in the form of a summary of leading cases. This appears as Part VII of the book and while it does not profess to be exhaustive, the editors hope that it will be found to contain many of those cases which most clearly illustrate the fundamental principles of the subject, and which should be useful to students in the examination room. The names of cases cited in the text and of which the facts are given in Part VII are printed in heavy type. ?

Several minor alterations have been made in the text of the book, matters on which students have not always been clear have been more fully explained, while those cases considered worthy of inclusion decided during the last two years have been added. Throughout the editors have tried to remember that primarily the book is a student's book, and therefore they have attempted to state rules as precisely and simply as possible. As in the previous edition, the citations of cases have been omitted from the text, where they distracted the student, and included in the table of cases for the benefit of the teacher.

The editors wish to thank all those whose advice and criticism have assisted them in the preparation of this edition, and particularly Mr. W. J. Weston, of Gray's Inn, Barrister-at-Law, Head of the School of Commerce, The Polytechnic, Regent Street, whose help in the preparation of the cases for inclusion in Part VII has alone made the addition of that part possible.

R. W. H.

R. H. C. H.

MAY, 1933.

PREFACE

THE present volume is designed to give a clear and comprehensive exposition of the main principles of the Mercantile Law of England.

There is no subject treated herein which has not been already exhaustively dealt with in textbooks of great value and erudition, and to these a lawyer or a specialist will turn for the fullest and most detailed information. But there are many practical points of law with which a business man must acquaint himself, and which a student who is taking a commercial course in a modern school must learn, and to these two classes such works are not generally accessible. A book of reference which will provide them with the rules of law upon general subjects in a short and clear form, and will indicate the sources from which further information may be obtained is an absolute necessity, and it is hoped that the present volume will prove such a book.

Every effort has been made to state the various propositions of law, as derived from statutes and legal decisions, as shortly as possible, and very full references have been made to such statutes and decisions. For this reason it is believed that the book will be of considerable assistance to the law student in the early stages of his career, when he is unable to devote his time to the larger treatises.

The whole treatment of the subject is similar to that which was adopted by the author in his more elementary work, entitled *The Commercial Law of England*, and which he followed during the several years in which he was engaged as a lecturer on Mercantile Law to numerous classes of pupils.

J. A. S.

1905.

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A. & E.	Adolphus & Ellis	1834-41
Amb.	Ambler	1737-83
B & Ad.	Barnewall & Adolphus	1830-34
B. & Ald	Barnewall & Alderson	1817-22
B. & C	Barnewall & Cresswell	1822-30
B. & P	Bosanquet & Puller	1796-1807
B. & S	Best & Smith	1861-69
Beav.	Beavan	1838-66
Bing.	Bingham	} 1822-40
Bing N. C	Bingham's New Cases	
Bligh	Bligh	1827-37
Burr	Burrow	1756-72
C.B	Common Bench	} 1845-65
C.B.N S	Common Bench, New Series	
C. & E	Cababe & Ellis	1882-85
C & J.	Crompton & Jervis	1830-32
C. & K.	Carrington & Kurwan	1843-53
C. & M.	Crompton & Meeson	1832-34
C M & R	Crompton, Meeson, & Roscoe	1834-35
C. & P.	Carrington & Payne	1823-41
Camp.	Campbell	1807-16
Cl & F.	Clark & Finnelly	1831-46
Co Rep	Coke's Reports	Elizabeth & James I
Com Cas	Commercial Cases	1895—
Cowp	Cowper	1774-78
Cro	Croke's Reports	Elizabeth, James I, & Charles I
De G. J. & S.	De Gex, Jones, & Smith	1862-65
De G. M. & G.	De Gex, Macnaghten, & Gordon	1851-57
Dougl.	Douglas	1778-85
Dow	Dow	1812-18
Dr. & Sm.	Drewry & Smale	1859-65
E. & B.	Ellis & Blackburn	1852-58
E.B. & E.	Ellis, Blackburn, & Ellis	1858-60
E. & E.	Ellis & Ellis	1858-61
East.	East	1800-12
Esp.	Espinasse	1793-1810
Ex.	Exchequer Reports	1847-56
F.	Fraser's Court of Sessions Reports (Scotland)	1898-1906
F. & F.	Foster & Finlason	1856-67
H. Bl.	Henry Blackstone	1788-96
H. & C.	Hurlstone & Coltman	1862-66
H.L.C.	House of Lords Cases	1847-66
H. & N.	Hurlstone & Norman	1856-62
Hagg. Adm.	Haggard's Admiralty Reports	1822-38
Hob.	Hobart's Reports	1613-25
Ir. R.	Irish Law Reports	1878—
J. & H.	Johnson & Hemming	1859-62
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Jur.	The Jurist	1837-67
Ld. Raym.	Lord Raymond	1694-1732

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L.J.C.P.	" " Common Pleas	1831-1875
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M. & G.	Manning & Granger	1840-45
M. & R.	Moody & Robinson	1830 44
M. & W.	Meeson & Welsby	1836-47
Mer.	Merivale	1815-17
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Moore P.C.C	Moore's Privy Council Cases	1836-73
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Sid.	Siderfin	1657-70
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Str.	Strange	1716 47
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T.R.	Term Reports	1785-1800
Taunt.	Taunton	1807-19
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Ves	Vesey	1747-1817
Ves & B	Vesey & Beames	1812-14
W Bl.	William Blackstone	1746-1779
W.N	Weekly Notes	1866—
W R	Weekly Reporter	1852-1906
Y & C.	Young & Collyer	1833-45
Y. & J.	Young & Jervis	1826-30

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MERCANTILE LAW

INTRODUCTION

Mercantile Law. The phrase Mercantile Law, or Commercial Law, is generally used to denote those portions of the law which deal with the rights and obligations arising out of transactions between mercantile persons. The selection of the portions is quite arbitrary. The law of England does not recognise any particular part of its system as being especially adapted to the requirements of persons engaged in commerce. There is in existence, it is true, a special court which is called the Commercial Court, to which has been assigned the trial of causes "arising out of the ordinary transactions of merchants and traders, amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, and mercantile agency and mercantile usages." But it is not always easy to understand what is, and what is not, a commercial cause, according to the rules laid down in the Annual Practice. It is no part of the province of this volume to attempt to define what the practice of the courts has left vague, but rather to draw together the rules relating to mercantile transactions which may be dealt with in any of the divisions of the High Court or in the County Courts. For this reason, therefore, matters are treated of in the present volume which are omitted from some of the ordinary manuals which deal with mercantile law.

Mercantile Persons. The persons who are known as mercantile persons are those by whom commercial transactions are carried on. A mercantile person may be a single individual—a sole trader, as he is often called—or a number of individuals acting together, as a partnership, or a company. Many transactions are carried on by means of agents, or persons who are

acting on behalf of others. The second part of the present volume deals with those persons who are not acting as sole traders.

Sources of Mercantile Law. The principal source of Mercantile Law is the common law of England, as modified and supplemented by equity and statute law.

Common Law

By the common law is meant the law administered in the King's courts after the Norman Conquest. Prior to 1066 the laws and customs of England were far from uniform. The customs of Yorkshire, for instance, were very probably unknown in Hampshire, and *vice versa*. And as these customs were administered in the local courts, and the courts had no connection with one another, it was impossible, until the whole kingdom was consolidated, for merchants to have mutual dealings with any degree of security. After the Conquest, the King's justices began to travel through the country, the powers of the local courts declined, and the law as administered at Westminster became the law for every part of the kingdom. This common law, as it is called, became fixed by the end of the reign of Henry 3.

Equity

Equity is that supplemental law which was formerly administered by the Court of Chancery, for the relief of those suitors who could find no adequate remedy in the common law courts. In course of time the rules of equity became as fixed as the rules of common law, but the systems were always kept distinct until the passing of the Judicature Acts of 1873 and 1875. Since the last-named year, law and equity have been administered equally in all the divisions of the High Court of Justice, and where there is a conflict between the rules of law and the rules of equity, the latter prevail.

Statutes

Statute law is the law laid down in Acts of Parliament. There is no Act of Parliament dating further back than the reign of Henry 3, the time, as has been stated above, when the common law had become fixed. An Act of Parliament is superior to and overrides any rule of common law or equity.

During the period when the common law of England was being fixed, little or no attention was paid in the

ordinary courts to trading, and it is not surprising to find that almost the whole of the early statutes passed by Parliament were concerned with land and its tenure. Hence it was that there sprang up amongst merchants and traders a number of customs and usages which were essential for the conduct of business, and which were not applied in the King's Courts. Some of these were derived from the practices of foreign merchants, some were taken direct from the Roman Law, and others, especially those referring to maritime commerce, were adopted from the various codes put forth by some of the leading cities of southern Europe at different periods of their existence. At first it was not possible to induce the English judges to recognise these customs and usages, however prevalent they might be; but a change took place when the administration of the law fell into the hands of lawyers who were not irrevocably wedded to ancient ideas.

Customs of
traders

During the reign of James I, Chief Justice Coke recognised some of the most important mercantile usages, and a further step forward was taken by Lord Holt, who was Chief Justice during the reign of Anne. Even he was willing to admit of the proof of these customs and usages only with limitations. This is well shown by a passage from the judgment of Chief Justice Cockburn in the case of *Goodwin v. Roberts* (1875): "Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and, in a series of successive cases, persisting in holding them not to be negotiable by

Recognition
of customs
by the courts

endorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by endorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble to the statute, which merely recites that 'it had been held that such notes were not within the custom of merchants,' that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that, by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt."

Lord
Mansfield

But the work of Lord Holt was completely overshadowed by the labours of Lord Chief Justice Mansfield (1705-1793). Owing to the latter's perseverance and great pertinacity, the *lex mercatoria*, or law merchant, as it is called, has been regarded, since the middle of the eighteenth century, as a part of the common law of England.

In the important case of *Goodwin v. Roberts*, to which reference has just been made, the following remarks occur in the course of the judgment: "The law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively modern origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein

on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it." It follows, therefore, that when once a general mercantile usage or custom has been judicially ascertained and established, it becomes a part of the common law, and courts of justice are bound to know and to recognise it.

Mercantile Property. Mercantile transactions are almost entirely concerned with what is known as movable property. Land, or immovable property, may be required for the purposes of a trading partnership; but in such cases it is treated, in many respects, as movable property.

Movable property is divided into two classes, (1) corporeal chattels, or *choses in possession*; (2) incorporeal chattels, or *choses in action*. The former class consists of all those things which have a material form, as a bale of goods, or coin of the realm. The latter class includes all claims or rights which can, if necessary, be enforced by legal process, as debts, stocks in the public funds, shares in companies, patents, trade-marks, and copyright.

It must be borne in mind that a chattel, unlike land, is the subject of absolute ownership, and can be transferred by delivery; consequently, there is not the necessity, in the case of a sale or transfer of goods, of tracing the title of the vendor or transferor with the care that is required in the conveyance of a piece of land. As will be seen in the chapter on the sale of goods, a sale in open market confers, *prima facie*, a good title to the goods sold, even though they have been stolen; and a "holder in due course," as defined by the Bills of Exchange Act, 1882, has an unimpeach-

able title to a negotiable instrument, whatever may have been the past history of the document.

Treatment of the Subject. It is impossible to obtain any correct idea of the ordinary transactions connected with mercantile affairs without a clear conception of the leading principles of the law of contract. The first part of this book, therefore, is devoted to a general view of contracts. When this first part has been mastered, the student will find no difficulty in applying the principles to the particular classes of contracts which are dealt with in Parts II and III. Part IV is devoted to mercantile securities—mortgages, bills of sale, pledges, and lien. In Part V a sketch is given of the law relating to the proceedings by which creditors can enforce their just claims against the estate of a debtor who has become incapable of meeting his obligations, and of the peculiar rights which they possess in cases of insolvency.

Part VI treats of miscellaneous matters. It includes a short chapter entitled "Shipping," which deals with those matters relating to merchant shipping which could not conveniently be dealt with under the headings of "Insurance" and "Carriage." Further, in Part VI a brief *résumé* will be found of the principal rules which are applicable in the case of Arbitration, and of the particular rules which govern contracts when made between persons who are domiciled in England and persons who are domiciled abroad, together with chapters on Copyright, Patents, Trade Marks, and Slander of Title and Passing Off.

Part VII sets out briefly the facts in a selection of leading cases, together with extracts from the judgments in those cases. The student will do well to refer to this section whenever, in his reading of the text of the book, he comes across a case referred to in heavy type.

PART I

GENERAL VIEW OF THE LAW OF CONTRACT

CHAPTER I

DEFINITION OF CONTRACT

"EVERY agreement and promise enforceable at law is a contract." This is the definition given by Pollock. Contract defined
It is worthy of careful thought, because a contract is often defined as an agreement enforceable at law. This is far from correct. An agreement which cannot be enforced at law, because it does not fulfil the requirements of certain statutes, e.g. the Statute of Frauds, or the Sale of Goods Act, 1893, or which is barred by the Statute of Limitations, may still be a contract. Very commonly, however, the term "contract" is used by English lawyers to convey the idea of the responsibility which arises from the voluntary engagement of one person to another, as distinguished from the liability which springs from a tort, or a wrong unconnected with any agreement.

A man cannot enter into a legal agreement with himself, and, consequently, there must be two parties at least to every contract. Necessity for two or more parties Again, before the Law of Property Act, 1925 (15 Geo. 5, c. 20) came into operation, if a man contracted to pay money jointly with others to some body of persons of which he was one of the members, the contract was void (*Ellis v. Kerr* (1910)). The principle of *Ellis v. Kerr*, however, was overruled by sect. 82 of the last-mentioned Act, which provides that "any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons, shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone."

Agreement
and obligation

Contract is the result of a combination of two ideas—an agreement and an obligation. For the present the important element of consideration is neglected.

Consensus
ad idem

To constitute an agreement there must be a meeting of two or more minds in one and the same intention. This is called a *consensus ad idem*. How this is brought about will be seen in the succeeding chapters. But a mere agreement is not sufficient to constitute a contract. Otherwise an arrangement between two friends to take a walk together, or to dine together, might give rise to an action at law

Intention to
create a legal
obligation

In addition to the agreement there must be a clear intention to create a legal obligation, that is, the parties must have it in their minds that, if necessary, the matter in hand shall be dealt with by a court of justice (**Balfour v. Balfour** (1919)).

In *Rose & Frank Co v. Crompton & Bros., Ltd.* (1923), an agreement provided: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either in the United States or England . . ." The Court of Appeal held, and was upheld on this point by the House of Lords, that the document did not constitute a binding contract and that an action on it would not lie. Lord Justice Bankes, in giving judgment in the case, said: "There is, I think, no doubt that it is essential to the creation of a contract, using the word in its legal sense, that the parties to an agreement shall not only be *ad idem* as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable."

"In the language of our law, therefore, the general term 'contract' comprises every description of agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound, expressly or impliedly, to another, to pay a sum of money, or to do or omit to do any particular act. . . . The term 'covenant' is properly applied to denote a contract under seal; and the term 'agreement' generally denotes a contract not

under seal; whilst the term 'promise' is used to signify any mere parol engagement by one person with another, where there is no consideration for the promise, nor any corresponding duty on the part of him to whom it is made." (Chitty on Contracts, pp. 1, 2).

Necessary Elements of a Valid Contract. In order to make a valid contract there must be—

(1) A communication by the parties to one another of their intention. This is Offer and Acceptance. 1 Communication

(2) Legal capacity to contract on the part of the parties. 2 Capacity

(3) Certain evidence, required by law, of the intention of the parties to affect their legal position. This is Form, or Consideration. 3 Form or consideration

(4) Legality and possibility as regards the subject-matter. 4 Legality and possibility

(5) An absence of any circumstance which might show that the agreement entered into by the parties was not genuine. There must not be anything in the shape of Mistake, Misrepresentation, or Fraud. 5 Absence of mistake or fraud

(6) "An agreement is not a contract unless its terms are certain or capable of being made certain" (Pollock). A court of law cannot enforce an agreement if it does not know what the agreement is, and it can obtain its knowledge only from the manner in which the parties have expressed their intention. 6 Certainty of terms

If any one or more of these elements is wanting, the so-called agreement, which purports to be a contract, will be—

(a) *Unenforceable*, that is, valid in itself, but not capable of being enforced in a court of justice; or

(b) *Voidable*, that is, capable of being affirmed or repudiated by one or other of the parties, according to his wishes; or

(c) *Void*, that is, destitute of all legal effect.

Classes of Contract. There are three classes of contract in English law—contracts of record, contracts under seal, and simple contracts.

A contract of record is either a judgment or a recognition. Its superior force is derived from the fact that 1 Contracts of record

it has been promulgated by, or is founded upon, the authority of a Court of Record. Such a contract, however, requires no further notice in the present volume.

a Contracts
under seal
or specialty
contracts

Writing

A contract under seal is generally called a specialty contract, or a deed. Four things are essential to a deed—writing, signing, sealing, and delivery. The writing may be done with any instrument, but the article used for writing upon must not be wood or cloth. In practice, parchment is used only if the matter is one of importance, and if there is a necessity for preserving evidence of the transaction over a long period of time; otherwise paper is sufficient. At common law it

Signing

seems that the signature of a party to the deed was not necessary, but no prudent person would ever have dispensed with the signature and been satisfied with the mere act of sealing. Moreover, it is enacted by sect. 73 of the Law of Property Act, 1925, that where an individual executes a deed he must either sign or place his mark upon it, and that sealing alone shall not be deemed sufficient. The ancient solemnity connected with sealing has passed away, and a wafer or a piece of sealing wax is used for present day purposes, but it must not be supposed that the wafer or the wax is necessary to constitute a seal to a deed. In cases where a corporation is a party to a deed there is often only an impression on the paper. By touching the wafer or the wax a party to the deed adopts it as his seal. The importance of delivery cannot be over-estimated, for unless delivery takes place the deed is of no effect.

Sealing

Delivery

Delivery may be actual, by handing over the instrument, or constructive, by speaking words which clearly indicate an intention of the party to deliver it. In practice, the wafer or the wax is affixed beforehand, and execution is completed by the party placing his finger on the seal and saying, "I deliver this as my act and deed." There is a good delivery if a party declares in the presence of a witness that he has delivered the same as his deed, and yet keeps the document in his own possession (*Doe d. Garmons v. Knight* (1826)). In *Xenos v. Wickham* (1867). Lord Cranworth said: "The efficacy

of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it." No date is essential to the validity of a deed.

When a deed is delivered subject to a condition, that is that the deed is not to take effect if the condition is not fulfilled, it is called an "escrow." Such delivery need not be by express words, but the fact that it is to operate as an escrow may be inferred from all the circumstances of the case. It is uncertain whether a deed may be delivered as an escrow to the grantee or covenantor himself, but it may be delivered as an escrow to a person who is acting as solicitor for all the parties to it, or to the solicitor of the grantee or covenantor, provided that it is made clear that the delivery is not intended as a delivery, at the time, to the grantee or covenantor (*Millership v. Brookes* (1860), *Watkins v. Nash* (1875); *London Freehold Co. v. Suffield* (1897)).

"Escrows"

A simple contract is often called a "parol" contract, and it makes no difference whether it is in writing or only made orally (*Rann v. Hughes* (1778)). The name "parol" applies to both. The writing is in many cases unnecessary, and in others it is used only because it is required by some Act of Parliament as a condition precedent to proof in court.

3 Simple or parol contracts

Contracts are sometimes divided into "executed" and "executory." An executed contract is one in which the object of the contract is at once performed, whilst an executory contract is one in which one of the parties binds himself to do, or not to do, a given thing at some future date.

Executed and executory contracts

Another division of contracts is into "express" and "implied." The former spring from the expressed intentions of the parties; the latter derive their force from the presumed intentions, to be gathered from the particular circumstances.

Express and implied contracts

Specialty and Simple Contracts Compared. Besides the differences in form, contracts under seal are distinguished from simple contracts in the following important respects—

(1) A contract under seal requires no consideration,

Consideration not required for specialty

or return for a promise, to support it. Hence, although a gratuitous promise is not legally binding, for example a promise to subscribe to a particular fund, a similar promise, if made by deed, is binding upon the promisor. But it has been doubted whether a total failure of the consideration, upon which a contract under seal was intended to be founded, does not afford a defence to an action on the contract (*Rose v. Poulton* (1831)). Also it is a general rule that specific performance of a contract under seal will not be decreed if there is a total failure of consideration (*Groves v. Groves* (1829)). An exception to the rule as to consideration is to be found in contracts in restraint of trade. These must be supported by a consideration, even though under seal.

Merger

(2) A contract under seal will "merge" in itself, that is, swallow up or supersede, a simple contract made between the same parties and containing the same terms.

Admissibility
of evidence
to explain
deed

(3) Statements contained in a deed are absolutely conclusive against the parties who make them, unless duress or fraud is proved, or unless one of the parties suffers from some incapacity, or the transaction is tainted with some illegality. This doctrine is technically known as "estoppel." No evidence is admissible to deny or to explain the statements, unless there is what is called a "latent ambiguity," that is a word or phrase used which on its face appears to be perfectly clear, but which can be shown to be applicable to different matters. In the same way, if a deed is incomplete in any material part when it is delivered it is void, and the omissions cannot be supplied. In the case of a simple contract a statement is only presumptive evidence of its truth, and the doctrine of estoppel does not apply.

Limitation of
actions

(4) A right of action arising out of a contract under seal is not barred for twenty years, with the exception of certain contracts with regard to land, which are barred at the end of twelve years (see page 107, *post*). The period allowed for taking action in the case of a simple contract is six years only.

CHAPTER II

FORMATION OF CONTRACT

IN order that a simple contract may be binding, there must be the mutual assent of two or more persons. These persons must have the same intention, and this intention must be declared. Into the mere mental workings of individuals the law cannot inquire. It must deal with facts, and facts only, and in the absence of some evidence as to the intention of the parties, express or implied, it will hold that there is no completed agreement, and therefore no contract. So important is this mutual assent that if there is an error as to the person with whom a man supposes that he is entering into a contract, and the consideration of the person forms an ingredient in the agreement, the error annuls the contract unless the contracting party would have been equally willing to enter into a contract with any other person (see further, pages 74 and 92, *post*).

Mutual
assent

Offer and Acceptance. A definite offer and an unqualified acceptance must always exist before a contract is formed. It is immaterial what is the nature of the agreement entered into, or what are the preliminaries through which the parties go.

The simplest examples of offer and acceptance are those in which goods are bought and sold. A seller may say, "Will you purchase these goods for £20?" If the buyer replies in the affirmative and adds nothing more, there is a complete contract between the parties. (The question as to whether such a contract is enforceable, in the absence of any writing to authenticate it, is omitted for the present.)

Example

But it is not always necessary that words, spoken or written, should be used in order to form a contract. Acts and conduct may be sufficient. Such a contract is called an "implied" contract, in contradistinction

Implied
contract

to the former, to which the name "express" is generally given.

Examples

Any number of examples will readily suggest themselves to the reader. An omnibus proprietor, by running his vehicle, offers to carry persons in a certain direction at a fixed price. An acceptance of the offer is complete as soon as the passenger takes his seat in or on the omnibus. A railway company, by publishing its time-table, offers to carry any person who purchases a ticket, subject to certain terms and conditions stated in its regulations; the offer is accepted and a contract made as soon as a purchaser tenders the money and receives a ticket (*Le Blanche v. London & North-Western Railway Co.* (1876); *Denton v. Great Northern Railway Co.* (1856)). In Denton's case a company altered its time-table so that a train in the time-table at 7 p.m. from P. to H. terminated at M., and did not go on to H. The plaintiff, relying on the time-table, arrived at P. for the 7 p.m. train to H, and found it went no farther than M. He was delayed and sustained damage. He was held entitled to recover, as the time-table amounted to a contract with those who should come to the station to carry them as stated. Again if a seller exposes his goods for sale, and a passer-by takes them up with the consent of the seller, and with the intention of purchasing them, there is a perfectly good contract. The seller offers to sell, and the buyer agrees to buy, at a fixed or at a fair price. At a sale by auction a bid is an offer to buy, and the fall of the auctioneer's hammer is an acceptance of the offer. In the same way, the delivery of an article to be repaired by a tradesman in the ordinary course of business is an offer on the one side to pay for the repairs, and an acceptance on the other to do the work in a skilful manner.

Offer and acceptance in correspondence

When there is a correspondence extending over a long period, it is not always easy to discover the exact point at which the offer is made and the acceptance communicated. But if in reality a contract does exist, both must be found somewhere in the letters which

have passed between the parties. It is generally more difficult to conclude that there has been an acceptance than that there has been an offer. In considering the question the whole of the correspondence must be looked at (*Hussey v. Horne-Payne* (1879)), and if it can be properly inferred that the parties were ever *ad idem* there is a contract; if not, then there is no contract (*Bellamy v. Debenham* (1891)). The fact that there are further negotiations between the parties does not matter, once it is ascertained that a definite offer has been made and accepted without qualification (*Perry v. Suffields, Ltd.* (1916)). It is quite possible for a valid and enforceable contract to exist when a definite proposal has been accepted, even though the parties have it in contemplation that a more formal contract shall be drawn up (**Winn v. Bull** (1877); *Bolton Partners v. Lambert* (1889); *Filby v. Hounsell* (1896)).

Where, however, the drawing up of a formal contract is a condition of the agreement, the contract is not effective until this is done (*Bromet v. Neville* (1909)). There have been numerous cases on this subject, many of them being difficult to reconcile with the general rule. The general rule in all cases is laid down by Parker, J., in *Von-Hatzfeldt-Wildenburg v. Alexander* (1912)—

"Subject to formal contract"

"If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Raingold v. Bromley (1931) may also be referred to.

Here, a contract for a lease, not specifying the terms of the lease, but entered into "subject to the terms of a lease," was held not complete.

Offer and invitation to offer

An offer must be carefully distinguished from an invitation to offer. The best illustration of this distinction is the case of a person asking for tenders to do certain work or to purchase certain goods. The invitation to tender has of itself no operation at all. The tender is an offer, and this must be accepted before there is any binding contract. There is no *prima facie* undertaking that the most advantageous or any offer will be accepted by the person who has invited the tenders (**Spencer v. Harding** (1870)). So also an announcement that an auction will be held at a particular time and place, though not expressed to be without reserve, will not render the auctioneer liable to recoup intending purchasers their expenses incurred in attending the place named if the auction is not held (**Harris v. Nickerson** (1873)). If, however, the auction is announced to be without reserve the rule is different (**Warlow v. Harrison** (1858), **Johnston v. Boyes** (1899), **McManus v. Fortescue** (1907)). An advertisement of an examination for a scholarship does not necessarily imply that the scholarship will be awarded to the competitor who obtains the highest number of marks (**Rooke v. Dawson** (1895)).

1 Offer may be to individuals or generally

Rules as to Offer. 1. An offer may be made to a definite person or to individuals generally. But until the offer has been accepted by a definite person there is no contract. Thus, an action is maintainable by a person who has fulfilled the conditions prescribed in an advertisement offering a reward, even although the acceptor has not given notice that he intends to accept the offer, conduct being sufficient acceptance. And the promise of reward by advertisement for rendering services in discovering any offender is binding, even though the person who fulfils the conditions is a constable, provided he goes beyond his ordinary duty (**England v. Davidson** (1840)). In connection with offer, reference should be made to **Carlill v. Carbolic Smoke Ball**

Co. (1893). The defendants advertised that they would pay a reward of £100 to any person who contracted influenza after using one of their "Smoke Balls" according to printed directions supplied to all purchasers. The plaintiff complied with all the directions, but nevertheless contracted influenza. It was held that the advertisement was an offer to contract which the plaintiff had accepted by the performance of the conditions contained therein, and that, having regard to the nature of the transaction, no notification of acceptance of the offer was necessary. The contract was binding and under it the defendants were bound to pay the £100.

Similarly in *Wood v. Letrik* (1932), a firm offered to pay £500 to the users of a comb with hair-restoring qualities if the user failed to derive benefit from it, and they were held liable to a user who had failed to benefit.

2. The person who makes an offer may attach any conditions he pleases to it, and prescribe any terms of acceptance he chooses. No one is compelled to accept the offer, and there is no acceptance until all the terms are complied with, however ridiculous they may be.

2 Offer may
be subject to
conditions

3. When an offer consists of various terms, care should be taken that the whole of the terms are brought to the notice of the other party. Whether sufficient notice has been given is a question of fact to be decided by a jury.

3 All terms
should be
brought to
notice of other
party

Cases of this kind arise in connection with railway and shipping companies. For example, a ticket is taken for a journey or for luggage left in a cloakroom. There are conditions attached to the transaction, or perhaps referred to upon the ticket. Are these sufficiently brought to the notice of the ticket holder? If so, he is bound by them; if not, he may be excused if he has acted as a reasonably prudent man. This principle was applied in *Henderson v. Stevenson* (1875), where a passenger purchased a ticket which had on its face "Dublin & Whitehaven." The passenger did not look at the ticket, but went on board the boat. On the journey his luggage was lost. In an action against the carrying company the company pleaded that on the

back of the ticket was an intimation that they would not be liable for losses of any kind. The court held that they were liable on the ground that it would be dangerous to hold that, where a document was complete on the face of it but had on the back matter not brought to the notice of the contracting party, the party had assented to that which he had not seen. *Henderson v. Stevenson* was distinguished in **Parker v. South Eastern Railway Co.** (1877), where a cloakroom ticket had conditions on the back and on the front were printed the words "See back." In addition, there was a notice of the conditions hanging in the cloakroom. The court held that the only question for the jury was whether the defendants had done what was reasonably sufficient to give the plaintiff notice of the condition. The mere fact that the conditions are difficult to ascertain does not prevent the party having notice of them as long as it is clear that his attention is called to the existence of the conditions (*Thompson v. L.M. & S. Rly. Co.* (1930); *Penton v. S.R.* (1931)).

4 Terms cannot dispense with necessity for acceptance

4. The person making the offer cannot bind any person by proposing such term or terms as would dispense with a communication of acceptance. Thus, if A writes to B in these terms "I will sell you my house for £500. If you do not reply I shall consider the affair settled," there is no contract if B takes no notice of the letter.

In *Felthouse v. Bindley* (1862), after a dispute as to the price at which Felthouse was to purchase his nephew's horse, Felthouse wrote to his nephew: "If I hear no more about him I shall consider the horse is mine at £30 15s." The failure of the nephew to reply was held not to amount to an acceptance of the uncle's offer, so that when, by mistake, an auctioneer, Bindley, sold the horse, the court held that Felthouse had no right of action against him as the horse was not Felthouse's property at the time. Also, a reply to an inquiry as to the price of an article is not an offer to sell at the price fixed by the vendor (*Harvey v. Facey* (1893)). In two other cases (*Taddy v. Sterious* (1904),

and *McGruther v. Pitcher* (1904)), an effort was made by vendors to bind purchasers to observe certain stipulations, a notice sent out with the goods being to the effect that the acceptance of the goods was to be deemed a contract between the purchasers and the vendors. In neither case did the purchasers observe the stipulations, and in the absence of any definite acceptance it was held that they were under no obligation to do so.

Revocation of Offer. When an offer has been made it is considered to remain open for a reasonable time, or until it is revoked. What is a reasonable time is a question of fact depending upon the circumstances of each particular case. In *Ramsgate Hotel Co. v. Montefiore* (1866), the defendant applied for a number of shares in the plaintiff company. No answer was received to his application for five months, when he was informed that the shares had been allotted to him. It was held that the defendant was entitled to reject them in consequence of the delay of the company in notifying the acceptance. But if no time is prescribed, and if there is no consideration for keeping the offer open (which would be a distinct contract), the person making the offer is entitled to revoke it at any time before it has been accepted. But notice of the revocation must be brought home to the offeree in some manner or other. This rule of law was settled in **Byrne v. Van Tienhoven** (1880), and followed in *Stevenson v. McLean* (1880). It is immaterial how the information is conveyed to the offeree. Thus, where property was offered for sale by A to B, and a certain time left open for B to think over the matter (there being no consideration for keeping the offer open), and before the expiration of the fixed time A sold the property in question to another person, it was held that the offer was revoked by the mere act of sale, and that since B had indirectly heard of the sale he could not insist upon accepting the offer which had been made by A and so binding him by contract (*Dickinson v. Dodds* (1876)). In this last mentioned case it was also observed by Mellish, L.J. :
 "It is admitted law that if a man who makes an offer

Offer remains open for reasonable time

Or until revoked

Notice of revocation

dies, the offer cannot be accepted after he is dead." And this is so even though the acceptor does not know of the death of the proposer.

1. Absolute
and
unconditional

Rules as to Acceptance. 1. The acceptance must be absolute and unconditional, and made in the manner and form prescribed in the terms of the offer. Any suggested variation amounts to a counter proposal (*Hyde v. Wrench* (1840)). In that case it was held that where A offered to sell his farm to B for £1,000 and B replied "I will give you £950," and on A's refusing to accept £950, B replied, "Very well, I will give you the £1,000 you ask," there was no binding contract. B's counter-offer of £950 amounted to a rejection of A's offer, and since on rejection an offer lapses, B could not accept subsequently.

It must not, however, be imagined that any communication by the offeree to the offeror after the making of the offer which is not an acceptance is a refusal. A party might inquire as to the exact meaning of an offer and what it included (*Stevenson v. McLean* (1880)). The question of an acceptance subject to a formal contract being drawn up has been already dealt with at page 15, *ante*.

2. Time for
acceptance

2. The acceptance must be made either within the time stipulated or within a reasonable time. See *Ramsgate Hotel Co. v. Montefiore* (1866), page 19, *ante*.

3. Acceptance
only by
person to
whom offer
made

3. If the offer is made to a specified person it can be accepted only by that person (*In re International Society of Auctioneers* (1898)).

4. Communica-
tion of

4. The acceptance must be communicated to the person making the offer or to his authorised agent, either by words or by conduct. A mental acceptance, uncommunicated to the proposer, is of no avail (*Moxley v. Tinkler* (1835); *Brogden v. Metropolitan Railway Co.* (1877)). In many cases it cannot be communicated except by express notice. An instance of acceptance by conduct would be the fulfilment of conditions prescribed in an advertisement containing an offer (*Carlill v. Carbolic Smoke Ball Co.* (1893)). This rule, however, that the acceptance must be actually communicated, is

subject to an important exception when the parties are in correspondence through the post office.

5. The acceptor must not be aware of the fact that the offer has been revoked, if, indeed, there has been a revocation.

5. Must be no knowledge of revocation of offer before acceptance

6. Acceptance concludes the contract. An acceptance cannot be revoked.

6. Acceptance cannot be revoked

With regard to offer and acceptance generally, it must also be noticed that where the person to whom an offer is made replies with a counter-offer, this is deemed to be a rejection of the original offer, and a new offer. If this, in turn, is rejected, the original offer does not revive.

Rejection of counter-offer does not revive original offer

Contract by Post. When the parties to a contract make use of the post as a means of communication, the post is considered, *prima facie*, as the agent of the first person making use of it, that is, generally, of him who makes the offer. It is as though the offer was being sent to the offeree by a special messenger who is the servant or agent of the sender. Upon the principles already laid down it is clear that an offer sent by post can have no effect unless it reaches the other party, and that, even though it has reached him, the offer can always be revoked by a later communication, however sent, so long as there has been no acceptance. But the mere dispatch of a subsequent letter of revocation which does not reach the acceptor until the offer has been accepted is of no avail—the contract is complete.

Post as agent of parties

On the other hand, an acceptance communicated by post is complete at the moment the letter accepting the offer is posted. It is as though the acceptance was handed to the agent of the person making the offer, and, as will be seen later when Agency is considered, the agent is generally in the same position as his principal. And it makes no difference even if, in fact, the letter of acceptance never reaches its destination (*Household Fire Insurance Co. v. Grant* (1879)). The post is not, as has been stated, *prima facie*, the agent of the acceptor, and therefore the acceptor is not responsible for any default caused by the loss or delay

of a letter. It would be different if the offer had been made by word of mouth, or by letter delivered by hand, and the acceptor had then taken the risk of the post upon himself, in the absence of any special agreement to that effect. When, therefore, an offer is made by post, the proposer should always stipulate for the actual receipt of the acceptance as a condition of the formation of the contract.

In accordance with the 6th rule as to acceptance, stated above, an acceptance once posted cannot be revoked, even by a subsequent letter or telegram arriving before the letter of acceptance has been received. See *Household Fire Insurance Co. v. Grant*, (1879). This appears to be the conclusion to be drawn from the authorities, but textbook writers have questioned whether this is correct.

Rules
governing
contract by
post

The rules as to communication by post have been well established by a series of cases, the principal of which are *Adams v. Lindsell* (1818); *Byrne v. Van Tienhoven* (1880); *Stevenson v. McLean* (1880), and *Henthorn v. Fraser* (1892). In *Adams v. Lindsell* the facts were as follows: A by letter offered B certain goods if he received an answer in course of post. The letter to B being misdirected, the answer notifying the acceptance arrived two days later than it should have done. A had in the meantime sold the goods to another party. It was held that there was a contract, binding on the parties from the moment the offer was accepted.

The rules governing *Henthorn v. Fraser* were stated to be: (a) That where it must be presumed from the circumstances in which an offer is made that the parties contemplated that the post might be used as a means of communicating the acceptance of the offer, the acceptance is complete as soon as it is posted; (b) that as, in this case, the parties were living in different towns, an acceptance by post must have been within their contemplation, although the offer had not been made by post; (c) that a revocation of an offer is not effectual until it has been brought to the mind of the

person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it, but from its receipt by the acceptor.

In *Bruner v. Moore* (1904), the rules laid down in *Henthorn v. Fraser* (1892), were applied by Farwell, J. Examples
In that case the plaintiff had an option to purchase patent rights under an agreement. The option expired on 29th March. On 22nd March the plaintiff telegraphed for the defendant's address, and on 23rd March wrote to the defendant asking for an extension of his option, various letters and telegrams passed between the plaintiff and defendant on 23rd, 24th and 25th March. On 26th March the defendant received the plaintiff's letter of the 23rd and telegraphed from Rome to the plaintiff: "Hotel Gênes, Genoa, Friday—Paris, Monday." On Saturday, the 28th, the plaintiff telegraphed to the defendant at Genoa exercising his option under the agreement, but before the telegram arrived the defendant left for Monte Carlo and proceeded to Paris on Sunday, arriving on Monday, the 30th. The plaintiff wrote a letter on 28th March to the defendant in Paris, confirming his telegram and exercising his option. This would arrive in the ordinary course on the 29th, but the defendant did not reach Paris until the 30th. The defendant contended that a telegram and letter sent on the 28th but not reaching him until the 30th were too late, as the option expired on the 29th. The court held that the option was duly exercised when the telegram was sent and the letter posted. The parties contemplated that "the post might be used as a means of communicating."

The facts of *In re London & Northern Bank, ex parte Jones* (1900), are also worthy of consideration upon this point. Jones applied for shares in a company. On 26th October, 1898, he wrote a letter withdrawing his application, and this letter was received by the company on 27th October, at 8.30 a.m. On the afternoon of 26th October the directors of the company resolved to allot the shares applied for to Jones. The allotment notices were prepared during the night of 26th-27th

October, and at 7 a.m. on 27th October were taken to the outer precincts of the London General Post Office. There a postman came on the scene and offered to take the letters. He was permitted to do so, and paid a fee for his trouble. Evidence was given to show that the letter to Jones was not actually posted until 11 a.m., and that postmen are forbidden by the rules of the Post Office to take charge of letters for the post. It was held that the letter withdrawing the application for shares (the offer) was received by the company before the letter of allotment (the acceptance) was posted, and that there was no contract binding upon Jones to take the shares.

Telegraph

If an offer is made by telegraph, it is to be presumed that an acceptance by telegraph is expected, or that a prompt reply is looked for (*Quenecruaine v Cole* (1883)). An acceptance by letter of an offer made by telegraph may be evidence of unreasonable delay on the part of the acceptor justifying the withdrawal of the offer. See also as to communications by post and telegraph, *Bruner v. Moore* (1904), which is referred to at page 22 *ante*.

Oral rejection
of offer made
by letter

Where communications are commenced through the medium of the post, and an offer made by letter is orally rejected, the person who made the offer is released from his liability, unless he subsequently consents to renew the offer (*Sheffield Canal Co. v. Sheffield & Rotherham Railway Co.* (1841)).

CHAPTER III

CAPACITY OF PARTIES TO A CONTRACT

CAPACITY to contract is governed by the law of the domicile. For most practical purposes this may be defined as the country in which the parties to the contract have fixed their permanent abode. Domicile does not altogether depend upon nationality. Thus, a Frenchman may come to England and decide to remain permanently in this country, although he has no wish to become naturalised here. His domicile is English. This rule as to the law of the domicile governing the capacity to contract is subject to two exceptions—

1. A person's capacity to bind himself by an ordinary mercantile contract is governed by the law of the country where the contract is made.

2. The capacity to contract in respect of immovable property, that is, land, is governed by the law of the country where the property is situated. •

In the present volume it will be assumed that the contracts specified are entered into in England between persons domiciled in this country, and that land, whenever it is referred to, is situated in England.

Every person is presumed to have the capacity to enter into a contract, but this presumption is capable of being rebutted as regards some persons, whilst others are disqualified by law. The capacity of an artificial person, such as a corporation, depends upon the charter or statute creating it.

Aliens. Since the Naturalisation Act, 1870, which is now replaced by the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), as amended by a short Act in 1918, an alien has had the same capacity to contract which a natural-born or a naturalised British subject possesses, with the one exception that an alien can not acquire any share or property in a British ship.

This capacity to contract, however, refers to times Alien enemies

of peace. There can be no contract between a British subject and the subject of a State at war with this country, unless the alien is resident in this country during the war, and has obtained a licence to trade. He can then carry on his business in accordance with the terms of his licence, and can sue in any of the King's Courts (*Schaffenius v. Goldberg* (1916)). An enemy alien can always be sued and has a right to appeal against a judgment given against him (*Porter v. Freudenberg* (1915)). Statutory regulations may, of course, make alterations in these rules.

Privilege of
foreign
sovereigns,
ambassadors,
etc.

Foreign states and sovereigns, their ambassadors and the officials of their households, may enter into contracts with British subjects, but they cannot be sued upon such contracts in England unless they are willing to acknowledge and submit to the jurisdiction of the English courts (*Mighell v. Sultan of Johore* (1893)). But although they cannot be sued, except under the condition just named, they are apparently fully entitled on their part to enforce any contracts into which they have entered. This privilege extends even to a British subject who is attached to a foreign legation, unless excluded by an express provision of English law (*Macartney v. Garbutt* (1890)). This special privilege is provided for by the Diplomatic Privileges Act, 1708 (7 Anne, c. 12).

Common law
rule

Infants. A person under the age of twenty-one is legally an infant. Prior to the Infants Relief Act, 1874 (37 & 38 Vict., c. 62), the contracts entered into by an infant were never absolutely void. Excepting for "necessaries" they were voidable only, that is, the infant might affirm them or repudiate them at his option. The Act of 1874 materially altered the law. By the first section of the Act it is provided that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void; provided always, that this enactment shall not

Certain
contracts
void

invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter except such as now by law are voidable." The second section runs, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Ratification
on attaining
majority

In the case of *Duncan v. Dixon* (1890), it was pointed out by Kekewich, J., that it was not easy to connect the two sections of the Act, but it will be seen that sect. 1 applies to, and makes absolutely void, all contracts entered into which are (a) for the repayment of loans, or (b) for goods supplied (other than necessities), or (c) accounts stated, that is, admissions of liability for money due. But notwithstanding the phrase used in sect. 1, it has always been considered that contracts under the Infants Relief Act are not void, but voidable only.

Construction
of Infants'
Relief Act

A contract for the exchange of chattels entered into by an infant is a contract for goods supplied, and if not for necessities is absolutely void under the Infants' Relief Act. But an action by an infant plaintiff for the recovery of a specific chattel transferred under such a contract will succeed only if a total failure of consideration is shown (*Pearce v. Brain* (1929)).

Exchange of
chattels

As to other contracts entered into by an infant it appears that they are still by the Act, as at common law, only voidable. An infant may ratify if he chooses, but his ratification after age will not give the other party to the contract any legal right to enforce the same.

Voidable
contracts

The benefit of infancy, which shelters the infant himself in cases of contract, is not a bar to his suing the other party to the contract. But he must sue by what is known as his next friend, that is, some relation or other person who will be responsible for the costs incurred in the action. And, similarly, if an infant is sued, he must be represented in the legal proceedings

Infants
rights to sue

by a guardian *ad litem*. An exception is made if the claim is for wages or for piece-work, the sum claimed not exceeding £100, when the action may be maintained by the infant as though he was of full age. The action is to be brought in the County Court. But the court will not allow an infant to take exceptional advantage of his position. For this reason, he cannot succeed in an action for specific performance, that is, the exact fulfilment of a contract, since this remedy is one which is the creation of a court of equity which requires mutuality of obligations, and obviously specific performance cannot be obtained *against* the infant (*Flight v. Bolland* (1828)).

Contracts of
continuing
liability

Again, it is clear law that in the case of contracts of continuing liability, such as a partnership, or as being a shareholder in a joint-stock company, an infant will be bound after attaining his majority unless he repudiates his liability within a short time of his coming of age. On an action against a firm of which one partner is an infant, for goods supplied to the firm, judgment cannot be recovered simply but may be recovered against the defendants "other than" the infant partner. Similarly, a receiving order must be made against the firm other than the infant partner (*Lovell & Christmas v. Beauchamp* (1894)).

Infant
member of
partnership

"Necessaries"

What are "necessaries" for an infant? No precise definition of this term can be given so as to cover all cases. A great deal depends upon the social position of the infant. And it must be borne in mind that the articles included in the term "necessaries" will vary with the advance of civilisation and wealth. It is certain that nothing can be a necessary which is not useful. The converse of this statement, however, is not true, for a thing may be useful and yet unreasonably extravagant in design or material. Adequate food, drink, apparel, and physic are obviously necessities. The same has been held in particular cases with regard to a servant's livery (*Hands v. Slaney* (1799)), a volunteer uniform (*Coates v. Wilson* (1804)), horse exercise (*Hart v. Prater* (1837)), instruction in a trade

and education (*Walter v. Everard* (1891)), and decent burial (*Chapple v. Cooper* (1844)). Even when the articles supplied are necessities, the prices charged for them must be reasonable (Sale of Goods Act, 1893, sect. 2). But it must be remembered that a tradesman acts at his peril who supplies an infant with what might be considered necessities if the infant is already sufficiently supplied with articles of the same kind. For example, two or three suits of clothes might be held to be necessities, but not twenty or thirty. The following remarks were made by Lord Esher, M.R. in *Johnstone v. Marks* (1887): "It lies upon the plaintiff to prove not that the goods supplied belong to the class of necessities as distinguished from that of luxuries, but that the goods supplied when supplied were necessities to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." In *Peters v. Fleming* (1840), which is one of the leading cases on the subject, the court held that "necessaries" included such things as were useful and suitable to the state and condition in life of the party. In addition, they must not be in excess of the actual requirements of the infant at the time (*Nash v. Inman* (1908)). The term is not confined to requisites for bare subsistence. Whether articles are such as a reasonable person of the age and station of the infant would require is a question for the jury, but purely ornamental articles are never necessities.

When an action is brought against an infant, and the defence of infancy is set up—and this is a special defence to be raised in the pleadings or of which notice must be given—the burden of proof is upon the infant to prove his minority at the time of entering into the contract. It is no answer in law to a plea of infancy that the infant fraudulently represented himself to be of age and that the other party contracted in reliance upon the representation (*Johnson v. Pye* (1665)). An action for fraud cannot be brought against an infant for fraudulently

Plea of
infancy

misrepresenting his age (*Leslie (R.), Ltd. v. Shell* (1914)). The plaintiff must then show that the goods supplied are necessities. For this purpose evidence is given to show the circumstances of the infant, and the court will then determine whether the goods can reasonably be considered necessities at all. If it comes to the conclusion that they cannot, it will not submit the case to the jury (if there is one), but enter judgment for the defendant; if, on the contrary, it is of opinion that there is evidence to show that they can be necessities, the whole question will be left in the hands of the jury (*Ryder v. Wombwell* (1868)).

Necessaries
supplied to
wife of
infant

An infant is liable for necessities supplied to his wife and children just as he is for those supplied to himself (*Turner v. Trisby* (1794)).

Without authority, express or implied, an infant cannot bind his parent or guardian, even for necessities.

Contracts of
service or of
apprenticeship

As a corollary to his liability for necessities, it has been held that a contract which is clearly for his benefit is binding on an infant, such as a contract of service or apprenticeship (*Clements v. London & North Western Railway Co.* (1894)). Even when there are covenants in an apprenticeship deed not altogether to the infant's advantage, the contract as a whole may be enforced. As Channell, J., said in the case of *Green v. Thompson* (1899): "The true question is whether the particular stipulation complained of is so unfair as to make the entire contract disadvantageous to the infant. You may find in any contract a clause which by itself is not to the advantage of the infant; but that is not enough; the contract, as a whole, must be disadvantageous." But if it is not for the infant's benefit it is void (*De Francesco v. Barnum* (1890), *Corn v. Matthews* (1893)). A covenant to serve in an apprenticeship deed is not binding upon an infant apprentice (*Gilbert v. Fletcher* (1629)), but a covenant to pay a fair and reasonable premium is enforceable when the infant has attained his majority (*Walter v. Everard* (1891)).

Recovery of
money paid

It must not be supposed because a contract is void or voidable, under sect. 1 or sect. 2 of the Infants

Relief Act, 1874, that an infant can recover money which he has paid for something which he has consumed or used. Thus, in the case of *Valentini v. Canali* (1890), it was held that although a contract by an infant to become tenant of a house and to pay for the furniture therein was void, yet after the infant had occupied the house for some months he could not, in addition to obtaining a declaration of the invalidity of the contract, recover the money which he had paid on account.

By sect. 5 of the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict., c. 4), it is enacted, "If any infant who has contracted a loan which is void in law agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of, or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purpose of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

Agreement
on attaining
majority to
pay void loan

Although referred to in other chapters of the present volume it may be noticed here that an infant is never liable upon a bill of exchange, even for the price of necessities (*In re Soltykoff* (1891)), and that it is very doubtful whether he can be made a bankrupt under any circumstances (*Ex parte Jones* (1881)).

Married Women. At common law, a wife had no power of contracting whatever, subject to a few exceptions which it is unnecessary to mention. If she did enter into a contract it was only as agent for her husband, and he alone could be sued upon the contract, or sue, if he chose to ratify it. The old law as to the capacity of a married woman has, however, become practically obsolete, and although the state of the present law is not in a satisfactory position, her

At common
law

obligations and rights in respect of her mercantile contracts are fairly well defined.

Married
Women's
Property
Acts

By sect. 1, sub-sect. (2) of the Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), it is provided that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise."

Construction
of Acts

Owing to the judicial construction placed upon this section in various cases, viz. that the separate property of a married woman was not bound by her contract, unless she had some property at the time of entering into the contract (*Palliser v. Gurney* (1887); *Leak v. Driffild* (1890)), the Married Women's Property Act, 1893 (56 & 57 Vict., c. 63), was passed, and by sect. 1 it is provided. "Every contract hereafter entered into by a married woman otherwise than as agent (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to, and (c) shall be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to; provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." It should be observed that the Act applies only to

married women contracting "otherwise than as agent." Whether she so contracts is a question of fact (*Paquin Limited v. Beauclerk* (1906)).

It cannot be too carefully remembered that there is no remedy against a married woman *personally* with respect to contracts entered into by her on her own behalf during marriage. She contracts with respect to her separate estate, and if she has no separate estate her creditors are without any remedy against her. She may be possessed of ample means, but if her property is in the hands of trustees, and she is "restrained from anticipation," that is, forbidden to alienate or charge her property in any way, a judgment obtained against her will in most cases be valueless so long as she remains a married woman. This restraint upon anticipation was invented as a particular safeguard for married women, but it has often been much abused. The restraint, it may be mentioned, lasts only so long as the marriage tie continues, though it revives upon the subsequent marriage of a widow if it attached to her property during the first marriage and she has not put an end to it between the first marriage and the second. In certain circumstances the court may remove the restraint on anticipation if its removal is for the benefit of the married woman, by reason of sect. 169 of the Law of Property Act, 1925. By sect. 19 of the Married Women's Property Act, 1882, no woman can settle her own property upon herself on the eve of and in contemplation of her marriage, and impress it with this restraint so as to defeat her creditors at the time of her marriage. The restraint on anticipation ceases to attach to the separate income of a married woman as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled (*Hood-Bars v. Heriot* (1896); *Whiteley v. Edwards* (1896); *In re Lumley* (1896)).

Owing to the restricted power of proceeding against a married woman, the Court of Appeal settled the form of judgment against her in the case of **Scott v. Morley** (1887). It is as follows: "It is adjudged that the

Separate
property only
bound

Restraint on
anticipation

Form of
judgment—
Scott v.
Morley

plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

Committal

A married woman cannot be committed upon a judgment summons, except in respect of contracts made before marriage, or of torts committed during marriage (*Draycott v. Harrison* (1886); *Scott v. Morley* (1887)). Formerly she was, after 1882 and before 1914, subject to the bankruptcy laws to a very limited extent; but under sect. 25 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), a married woman who carries on a trade or business, whether separately from her husband or not, is subject to the bankruptcy laws as if she was a *feme sole*. Moreover, a final judgment obtained against her, even in the form of *Scott v. Morley*, as set out above, entitles a creditor to issue a bankruptcy notice against her. In certain circumstances, even the property which a married woman is restrained from anticipating may be taken in her bankruptcy. It must be carefully borne in mind that a married woman cannot be made a bankrupt unless she is engaged in trade or business.

Effect of
death of
husband

Whenever a judgment is obtained against a married woman, the death of her husband does not convert the judgment into a final judgment upon which she can be made personally liable (*Softlaw v. Welch* (1899)).

The peculiar immunities of a married woman cease as soon as she becomes a widow.

Antenuptial
debts

She is always liable, whether married or unmarried, for any of her antenuptial debts, subject, of course, to such defences as infancy or the Statute of Limitations. The husband, moreover, is liable for his wife's antenuptial debts only to the extent of any property which he acquires in right of his wife.

The old common law doctrine of the husband and wife being one person has been practically destroyed, so far as the power of contracting is concerned, and a wife can, therefore, contract with her husband in respect of her separate property just as with any other person. By sect. 12 of the Act of 1882 it is provided that the wife has the same civil remedies against all persons, including her husband, for the protection and security of her separate property, as if such property belonged to her as a *feme sole*. The husband's position as regards his wife is different. See sect. 17 of the Act.

Power to
contract with
husband

So long as a husband and wife are living together, the wife has an implied authority to bind her husband, acting as his agent, for necessities for herself, and in household matters generally. But the authority is only an implied one, and may be rebutted by the husband's showing that he has forbidden her to pledge his credit, that he has warned certain tradesmen not to deal with her, or that she is already well and sufficiently supplied (**Debenham v. Mellon** (1880)). The authority continues as to necessities for herself if the parties are living apart, without any fault on the part of the wife, and the husband neglects or refuses to maintain her (**Morel Brothers & Co. v. Earl of Westmorland** (1904)). There is no implied authority in the wife to pledge her husband's credit for goods other than necessities (**Debenham v. Mellon** (1880)). The settled law as to the power of the wife to bind her husband is the result of the decisions in many well-known cases, the principal of which are *Manby v. Scott* (1659); *Montagu v. Benedict* (1825); **Seaton v. Benedict** (1828); *Jolly v. Rees* (1863); and *Smout v. Ilbery* (1842). In the last-named case it was decided that a widow contracting as her husband's agent in ignorance of his death is not personally liable on the contract, nor was the husband's estate liable. To-day the woman might be made liable for damages for breach of warranty of authority (**Yonge v. Toynbee** (1910)).

"Necessaries"

Corporations and Companies. A corporation is a fictitious person, consisting of one or of many individuals—in the former case called a "corporation sole,"

Corporations

and in the latter a "corporation aggregate"—enjoying perpetual succession, a distinctive name, and a common seal. It is a creation of an Act of Parliament, or of a charter of incorporation granted by the Crown.

Companies

A company is nothing more than a form of corporation incorporated under the Companies Act or some other statute. The nature of a company, its formation, and its powers will be examined more fully in a later chapter.

The capacity of a corporation or of a company to contract depends upon the purposes for which it is formed, as set forth in the statute, charter, or memorandum of association by which it is constituted. If it exceeds its powers in this respect it is said to act *ultra vires*, and any such contract entered into is absolutely void.

Corporations— Necessity for contract under seal

Exceptions to rule

As a general rule a corporation cannot bind itself except by a contract under seal (*Arnold v. Mayor of Poole* (1842)). But the rule is subject to many exceptions. If the matter is one of slight importance, or of great urgency, the seal will be dispensed with. It will also be dispensed with where the contract is made in furtherance of an object for which the corporation exists and the consideration for payment is executed, e.g. supply of meat to a workhouse, where the meat has been accepted. There is an increasing tendency to give validity to contracts made with corporations, and not under seal, which arise in the ordinary course of business (*Clarke v. Cuckfield Umon* (1852); *Nicholson v. Bradfield Union* (1866); *South of Ireland Colliery Co. v. Waddle* (1869)). The cases of *Clarke v. Cuckfield Union* and *Nicholson v. Bradfield Union* were approved in *Lawford v. Billericay Rural District Council* (1903), the headnote of which is as follows: "Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work

done or the goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

These exceptions, however, are subject to an important limitation contained in the Public Health Act, 1875 (38 & 39 Vict., c. 55), sect. 174, of which provides that "every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing, and sealed with the common seal of such authority."

Public Health
Act

Hunt v. Wimbledon Local Board (1878), is the leading authority on the construction of this section. The defendants orally directed their surveyor to employ the plaintiff to prepare plans for a new building. The plans were finished, were submitted to and approved by the defendants, but the building was never erected. When the plaintiff demanded payment of £90, the estimated value of the plans, the defendants repudiated liability, and in an action subsequently brought they succeeded in defeating the plaintiff's claim. In the course of the judgment it was said, "The real meaning of the statute seems to be this: the Legislature, knowing of the exceptions which existed at the time the statute was passed with regard to small contracts of frequent occurrence which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what were small matters, and to say that contracts which the board would not otherwise be authorised to make might be made for amounts less than £50—that is to say, that if they were necessary, and under £50, they should be brought within the recognised exception as to small matters, and that, if they were over £50, the mere fact of their being over £50 would prevent their coming within the exception." This case was followed in *Young v. Leamington* (1883). A distinction

was made in *Eaton v. Basher* (1881), on the ground that the value of the contract, at the time of entering into it, was not contemplated as being likely to amount to £50. As to the distinctions on other grounds the following cases should be referred to: *Scott v. Clifton School Board* (1884); *Mells v. Shirley Local Board* (1885); *Williams v. Barmouth Urban Council* (1897); *Spencer, Whalley and Underhill v. Southall Norwood Urban Council* (1905); *Baker and others v. Holme Cultram U.D.C.* (1916).

Execution of
instruments
by corpora-
tions

By sect. 74 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), a deed is deemed duly executed by a corporation in favour of a purchaser, if its seal has been affixed to the contract in the presence of and attested by the clerk, secretary, or other permanent officer or his deputy, *and* by a member of the board of directors or other governing body. Further, the governing body has power to appoint an agent to execute any contract not under seal on behalf of the corporation as long as the contract relates to matters within the powers of the corporation. The Act does not affect the validity of any mode of execution authorised by law, practice, statute, charter, memorandum, or articles, deed of settlement, or other instrument.

Companies

With regard to contracts of a company registered under the Companies Acts, sect. 29 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), provides that, if the contract would be required to be under seal if made by private persons, then the company must make such contract under the common seal. If, on the other hand, a parol contract is sufficient in the case of a private individual, it is sufficient in the case of a company. Further, a contract which if made between private persons would have to be in writing signed by the person to be charged, may be made on behalf of the company in writing signed by anyone acting under its authority, express or implied.

Somewhat similar powers of contracting in the same way as private individuals are given to the directors of companies coming within the Companies Clauses

Consolidation Act, 1845 (8 Vict., c. 16), by sect. 97 ¹/₂ of that Act.

As a company does not exist until it is incorporated it cannot enter into any contract before incorporation. Thus, if the promoters of a company enter into a contract on behalf of a company about to be formed, as the company is non-existent, they cannot be agents for it, and are consequently personally liable on any contracts they may make, in spite of the ratification of the contracts by the company (**Kelner v. Baxter** (1866)). Similarly, the company after incorporation cannot sue on the contract since they were not parties to it (*Natal Land Co. v. Pauline Colliery Syndicate* (1904)). The difficulty created is overcome as a general rule by the preparation of a draft contract which is only made binding when the company is registered and entitled to commence business.

Contracts of
companies
before
incorporation

It is also to be noticed that by sect. 3 of the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), it is expressly provided that that Act shall in no way affect the law relating to corporations.

Persons of Unsound Mind. The contract of a person of unsound mind is voidable, and not absolutely void, though his estate is always liable for the reasonable price of necessities supplied to him.

Contract
voidable

But in order that a person of unsound mind, or his committee, may claim the benefit of repudiation of a contract into which he has entered, while in an unsound state of mind, it must be shown that his mental condition was known to the other party to the contract at the time of entering into it. The case of **Imperial Loan Company v. Stone** (1892), clearly indicates the settled state of the law as to the validity of contracts made by persons of unsound mind. The action was upon a promissory note which the defendant had signed as surety. The defence set up was that he was so insane at the time he signed the note that he was incapable of understanding the transaction. The jury found that such was the case. The question then arose whether it was further necessary for the defendant to prove that the

plaintiff company knew of the state of his mind, and it was decided that it was so. Lord Justice Lopes said: "A defendant who seeks to avoid a contract on the ground of his insanity must plead and prove not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

Lucid
intervals

During a lucid interval a person of unsound mind has the same capacity of contracting as any other person, and he may also then ratify and confirm any contract entered into while insane.

Drunken Persons. A drunken person, who is in such a condition as not to understand what he is doing, is in the same position as to contracts as a person of unsound mind (*Gore v Gibson* (1845); *Matthews v. Baxter* (1873)). But a person in a state of intoxication may be held liable on an implied contract to pay for necessities supplied to him, or for necessary services rendered to him whilst in that state. Partial drunkenness, if induced by fraud or in any way taken advantage of, is a ground for setting aside a contract entered into by a person whilst in that condition (*Cooke v. Clayworth* (1811); *Butler v. Mulvihill* (1819)).

Convicts. By the Forfeiture Act, 1870 (33 & 34 Vict., c. 23), convicts are incapable of suing in an action or of making any contract, except while they are lawfully at large under any licence. By sect. 6 of the Act a convict is defined to be a person against whom judgment of death or of penal servitude has been pronounced.

Bankrupts. As a general rule bankruptcy has no effect on the capacity to contract. By the provisions of sect. 155 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), however, a bankrupt may not obtain credit amounting to ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt; nor may he engage in trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business

transaction the name under which he was adjudicated bankrupt.

On his bankruptcy, the rights and liabilities of a party to a contract devolve upon his trustee in bankruptcy who can exercise the rights for the benefit of the estate and has a further right to disclaim any property which is subject to onerous conditions (see page 430, *post*).

CHAPTER IV

FORM AND CONSIDERATION

Origin of
informal
contracts

THERE is nothing which more clearly shows the growth of ideas than a comparison between the ancient and the modern conception of contract. Among the ancients form was everything, and the true substance of the contract was lost sight of. According to the modern conception, however, in the words of Sir F. Pollock, "All agreements which satisfy certain conditions of a general kind are valid contracts and may be sued upon, in the absence of any special legislation forbidding particular contracts to be made or denying validity to them unless made in particular forms." There was but one English formal contract, the contract under seal, or the deed, and this has been already sufficiently explained. The making of a deed was always considered to be an act of great solemnity, and its superior position at the present day is partly ascribable to the solemnity and formality which accompanied it. And since it was always supposed that its formation had been preceded by careful deliberation, nothing further was required in order to complete it beyond due execution and delivery. A deed itself is a contract.

But it obviously became impossible, with the continuous growth of mercantile transactions, to secure the execution of a deed on every occasion. Some simpler and quicker means of binding individuals was required. Informal agreements were entered into, but at first the courts of law refused to give force to them. The way in which a change was effected belongs to the History of Law. Suffice it to say, that by degrees it came to be recognised that, even though the agreement was of an informal nature, it would be enforced if there was a consideration to support it. Thus, the present day rule is arrived at, that a contract under seal is sufficient in itself to give a right of action, whereas a

simple contract must be supported by a consideration in order to make it enforceable.

Contracts Required to be Under Seal. A deed may be used in any mercantile or other transaction which is of the nature of a contract. This, however, rarely happens; and the use of this solemn instrument is practically confined to those cases in which the law has directed that sealing is indispensable. Of these the following are the principal—

- | | |
|---|-----------------------------------|
| (a) Contracts by which shares in companies under the Companies Clauses Consolidation Act, 1845 (8 Vict., c. 16) are transferred; in addition it is a general rule for the articles of association of a limited company to require a deed for such transfer. | (a) For transfer of shares |
| (b) Contracts by which British ships or shares therein are transferred. | (b) For transfer of British ships |
| (c) Contracts for the sale of sculpture, together with the copyright in the same. | (c) For sale of sculpture |
| (d) Contracts entered into with corporate bodies. These have been noticed in the preceding chapter. | (d) With corporations |
| (e) Conditional bills of sale. | (e) Bills of sale |
| (f) Contracts not supported by consideration. | (f) Where no consideration |

By the combined effects of sects. 52 and 54 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), all conveyances of land, legal mortgages, and certain leases which are to last more than three years, must be made by deed. But these matters are not strictly within the limits of ordinary mercantile law.

Simple Contracts. Every contract which is not a contract under seal, or which is not a contract of record, is called a simple contract. In order that such a contract may be enforceable at law it must be supported by what is called consideration. The law of simple contract was of slow growth, but when once the idea of consideration had forced its way into English jurisprudence, nothing but evidence of the agreement of the parties was necessary in order to establish the existence of a contract which the courts would inquire into, and enforce, if necessary.

For some centuries the fact of an agreement having

Simple
contracts
required to be
evidenced by
writing

been made and the existence of a consideration were the only requisites; but after the passing of the Statute of Frauds in 1677 it became necessary that certain contracts should be evidenced by writing. It cannot be remembered too carefully that the writing does not affect the existence of the contract. The writing itself is only evidence of the contract, and the law does not require the writing except as evidence of the fact that a contract has been entered into. This distinguishes it from a deed which is the contract. It is always safe to have some document in writing to which reference can be made in cases of difficulty and dispute, but if a contract can be proved otherwise, it is always enforceable in a court of law unless it falls within the class of those which absolutely require the existence of writing to support them, or in respect of which there is some special statutory provision, e.g. bills of exchange.

Apart from the Statute of Frauds, 1677, and the Sale of Goods Act, 1893, sect. 4 (see page 230, *post*), there are certain statutes which require special kinds of contracts to be in writing. It should be noticed that while the Statute of Frauds and the Sale of Goods Act require writing as a matter of evidence before an action can be brought, certain statutes require writing for the validity of a contract. The following are the chief contracts for which writing is required—

Simple
contracts
required
to be in
writing

1. Bills of Exchange. This was necessary by the *lex mercatoria*, and was adopted by the common law. A statute of the reign of Anne (3 & 4 Anne, c. 9) required that promissory notes should also be in writing. Both are now governed by the Bills of Exchange Act, 1882.

2. Assignments of copyright, by the Copyright Act, 1911.

3. Contracts of marine insurance under the Marine Insurance Act, 1906.

4. Shares in companies registered under the Companies Acts must be transferred in writing (Companies Act, 1929, sect. 63), and articles of association frequently provide for shares to be transferred by deed.

It may be observed that writing is required by statute in two other cases, which, though not strictly contracts, are sufficiently important to be noticed here. The first is an agreement by a debtor to pay a debt which is statute-barred (this subject is fully discussed at page 109, *post*), and the second is a representation as to the conduct, character, credit, or ability of another, which is further referred to at page 372 *post*.

Statute of Frauds, 1677. It is only necessary to mention two sections of this celebrated statute (29 Car. 2, c. 3)—the fourth and the seventeenth. The latter has been repealed and practically re-enacted by the fourth section of the Sale of Goods Act, 1893, to which fuller reference is made in a later chapter (see page 230, *post*), while sect. 4 has been repealed so far as it relates to land and interests in land by the Law of Property Act, 1925 (15 Geo. 5, c. 20); but by sect. 40 of that Act the repealed provisions have been substantially re-enacted. The joint effect of the Statute of Frauds, 1677, sect. 4, and the Law of Property Act, 1925, sect. 40, is as follows—

No action may be brought—

- | | |
|--|--|
| 1. To charge any executor or administrator upon any special promise to answer damages out of his own estate; or | Promise of personal representation |
| 2. To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another; or | Guarantee and suretyship |
| 3. To charge any person upon any agreement made in consideration of marriage, or | Agreements in consideration of marriage |
| 4. Upon any contract for the sale or other disposition of land or any interest in land; or | Contracts for sale of land |
| 5. Upon any agreement that is not to be performed within the space of one year from the making thereof— | Agreements not to be performed within a year |

Unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or some other party thereunto by him lawfully authorised.

Of these five kinds of contract which must have some document in writing to evidence their existence, the

second, relating to suretyship and guarantee, will be more fully considered later (see page 360, *post*); the first, third, and fourth are outside the general scope of this volume. The fifth kind of contract, therefore, will alone be considered in this chapter. It may, however, not be out of place to add one word of warning as to leases, since the letting of premises for business purposes is essentially a practical part of mercantile life. By sect. 54 of the Law of Property Act, 1925, certain leases which do not extend beyond three years may be made without any document in writing being necessary. But if there is an agreement for a lease for the same period, and the lessee has not entered into possession, such agreement is not enforceable at law unless it is evidenced by some memorandum or note in writing.

Contracts
not to be
performed
within a year

A contract which is not to be performed within the space of one year means one which cannot, according to its provisions, be wholly performed, or is incapable of performance within the year. The well-known case of **Peter v. Compton** (1694) is the leading authority upon the subject. Moreover the section applies only to a contract which is not to be performed on either side within the year. Thus, in *Donellan v. Read* (1832), in an action brought by a landlord against his tenant for an increased rent of £5 per annum during the remainder of the term of a lease (of which several years were unexpired), the consideration being the making of certain improvements by the landlord at a cost of £50, it was held that as the landlord had done the repairs forthwith the fourth section of the Statute of Frauds did not apply.

Examples

The best example that can be given is the very common one of the engagement of a servant. If the engagement is to commence immediately and is to continue for one year, there is no need for the contract to be evidenced by writing. But if the engagement is to commence next week and to continue for one year certain there must be some memorandum or note to satisfy the statute, otherwise no action can be brought upon the contract (*Bracegirdle v. Heald* (1818); *Britain*

v. Rossiter (1879)). A general hiring of a clerk—which may be construed to be a hiring for a year (though not necessarily so), and so on from year to year as long as the parties please—need not be in writing (*Beeston v. Collyer* (1827)). But a hiring for a year, although terminable at any time by six months' notice on either side, is within the statute (*Hanau v. Ehrlich* (1912)).

How strictly the section may be construed is shown by the case of *Dollar v. Parkinson* (1901), where Darling, J., held that an oral agreement made on the 4th September, as to the employment of the plaintiff for one year commencing the 5th September, was not binding upon the defendant. But this decision was not followed by the Divisional Court in *Smith v. Gold Coast & Ashanti Explorers, Ltd.* (1903), where it was laid down that no memorandum or note in writing was necessary where the employment for a year was to commence on the day following that upon which the agreement was made. The Court of Appeal, before whom the latter case came, did not express an opinion upon this construction of the section, and it would be safer, at present, to accept the former decision as being the more correct exposition of the law.

In any action, in either the High Court or a county court, a defendant must specially plead the Statute of Frauds if he intends to rely upon it as a defence.

Statute
must be
specially
pleaded

The Memorandum or Note. The memorandum or note in writing which is required to evidence the existence of a contract need not be made at the time when the contract is entered into. It must, however, be in existence before any action can be brought upon the contract itself (*Bill v. Bament* (1841); *Lucas v. Dixon* (1889)). However, pleadings signed by counsel in an action which was subsequently reconstituted have been held to form a memorandum or note in writing signed by the agent of the party to be charged (*Farr Smith & Co., Ltd. v. Messers, Ltd.* (1928)).

No special form is required. It is "just such a memorandum as merchants in the hurry of business might be supposed to make." But it is necessary that

Form

Examples

the names of the parties should appear, that the subject-matter of the contract should be set forth, that the consideration for the promise should be stated (except in the case of a guarantee), and that the party to be charged, or his duly authorised agent, should sign the document (*Vandenbergh v. Spooner* (1866); *Sale v. Lambert* (1874); *Rossiter v. Miller* (1878)). If the party to be charged writes out the memorandum or note himself, and his name appears in any part of it, that is a sufficient signature, provided it is clear that it governs every part of the instrument (*Knight v. Crockford* (1794); *Caton v. Caton* (1867)), and the same has been held to be true where a document was drawn up by the agent of one of the parties, in which the name of the principal appeared, although it was never signed either by the principal or by the agent (*Evans v. Hoare* (1892)). A proposal signed by a party to be charged, and orally accepted by the person to whom it is made, is a memorandum or note sufficient to satisfy the statute (*Reuss v. Picksley* (1866)). But there must be something which is in the nature of a signature. As was said in the case of *Selby v. Selby* (1817): "It is not enough that the party may be identified. He is required to sign. And after you have completely identified, still the question remains, whether he has signed or not."

A telegram is a sufficient memorandum (*Godwin v. Francis* (1870)), and a recital in a will was held to be a memorandum or note to satisfy the statute in the case of *In re Hoyle* (1893); and in order to connect the parties, when the name of the one to be charged and his signature appeared in the document relied on, but the name of the other party to the contract was not there, the envelope in which the document was sent was allowed to be put in evidence to show who the other party was, and thus make the memorandum complete (*Pearce v. Gardner* (1897)); for the same reason a leather cover bearing the name of one of the parties was used to complete a memorandum, signed in a paper book which fitted into the leather cover (*Jones v. Joyner* (1900)). These last two cases are good

illustrations of the policy of the courts, which is, acting upon the maxim *ut res magis valeat quam pereat*, to endeavour to uphold an agreement, whenever it is shown that one has been made, and not to allow it to be rendered void by a mere technicality.

The memorandum or note required need not necessarily be contained in one document. But when there are several documents they must be so connected that they can be read together. Parol evidence is not admissible to connect two or more writings (*Boydell v. Drummond* (1809)). But such evidence is admissible to identify references, and has been acted upon in many cases (*Ridgway v. Wharton* (1857); *Jones v. Victoria Graving Dock Company* (1877); *Cave v. Hastings* (1881); *Studds v. Watson* (1884); *Oliver v. Hunting* (1890)).

Memorandum
in several
documents

Although it is the common practice for both parties to sign the memorandum or note, this is not essential. The signature required is that of the party to be charged and, therefore, it follows that one party who has not signed the memorandum may enforce a contract against the other who has done so (*Laythorpe v. Bryant* (1836)). The signature may be made in ink or pencil (*Geary v. Physic* (1826)), by mark (*Baker v. Denning* (1838)), or by initials (*Phillimore v. Barry* (1808); *Chichester v. Cobb* (1866)).

Signature of
party to be
charged

The memorandum of agreement, or any agreement made under hand only, and not otherwise specifically charged with duty, must be stamped with a sixpenny stamp. An adhesive stamp may be used, but it must be cancelled by the person first signing the agreement. Fourteen days after execution are allowed for the stamping of an agreement under hand, and such post-execution stamping should always be by an impressed stamp. The following agreements are exempted from stamp duty—

Stamp
duties

1. Where the subject-matter is of less value than £5, or is incapable of pecuniary measurement.
2. Where the agreement has reference to the hire of any labourer, artificer, manufacturer, or menial servant.

3. Where the agreement is one relating to the sale of any goods, wares, or merchandise.

Memorandum
required

Moneylenders' Contracts. Sect. 6 of the Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), requires a written memorandum signed personally by the borrower, of any moneylender's contract for the repayment of money lent or for the payment of interest thereon. A copy of the memorandum has to be delivered to the borrower within seven days of the making of the contract. Any contract requiring a memorandum and of which there is no memorandum is unenforceable; similarly any security given by the borrower in respect of such contract is unenforceable. It should be observed that the memorandum has to be signed before the money is lent. In this respect it differs materially from the memorandum required by the Statute of Frauds.

Consideration. The existence of a document in writing does not dispense with the necessity for consideration. Unless the contract is under seal there must be a consideration. This is only a repetition of what has been already said; but it is important to impress the fact upon the mind of the reader, because it is often imagined that a contract in writing, as it is incorrectly called, is something different from a parol contract.

Good
consideration

Considerations are of two kinds, good and valuable. A "good" consideration consists in natural love and affection. This is not sufficient to support a simple contract. The consideration required is what is known as valuable.

Valuable
consideration

A "valuable" consideration has been defined in the case of *Currie v. Misa* (1875), as "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." More shortly it may be defined as some return or equivalent for a promise made or an act done to show that the promise was not made gratuitously. The simplest illustration is the payment of a sum of money for the purchase of goods, or for an undertaking to do some piece of work.

Bills of exchange appear at first sight to form an exception to the rule as to consideration. This is not so in reality. By the *lex mercatoria* consideration is presumed, though this presumption may be rebutted as between immediate parties to the bill.

Bills of
exchange

Requisites of Consideration. (1) The consideration must be of some value, however slight, and must proceed from the person to whom the promise is made. Adequacy is not required, and very slight acts may amount to consideration. Thus, in **Bainbridge v. Firmstone** (1838), the plaintiff allowed the defendant to take some boilers and weigh them, and afterwards brought an action against him for not restoring them in good condition, as he had promised to do. It was held that the mere allowing to weigh was a sufficient consideration.

1. Must be of
value

Similarly, where the defendants advertised offering to give advice on investments and the plaintiff asked for advice, the only consideration for the contract being the permission to insert the replies in their paper, the contract was held to be valid and the defendants liable for negligently recommending an outside broker who was an undischarged bankrupt (*De la Bere v. Pearson, Ltd.* (1907)).

Forbearance to sue is a valuable consideration (*Linnegar v. Hodd* (1848)), even though the claim is a doubtful one (*Longridge v. Dorville* (1821)), and so is a *bona fide* compromise of a non-sustainable claim (*Miles v. New Zealand Alford Estate Co.* (1886)). A promise made in return for a promise is a sufficient consideration to support a simple contract, provided that the promises are made by the parties mutually and concurrently (*McNeil v. Reid* (1832); *Thornton v. Jenyns* (1840)). Marriage is a valuable consideration. Inadequacy of value may induce the court in certain cases to set aside a contract, but this can happen only when the inadequacy is such as to raise a presumption of fraud.

(2) If the consideration consists of something to be done by one of the parties to the contract, it is necessary that the act should not be such as the promisor is already under a legal obligation to do. But a very

2. Not an act
that promisor
already bound
to do

slight excess of duty will be sufficient to create a consideration (*Shadwell v. Shadwell* (1860)).

3. Must be certain

(3) The consideration must not be of a vague and indefinite character. It must be something which the law can enforce, if necessary. Thus, a promise to give an additional £50 for certain goods, if the buyer should make a good profit out of their re-sale, is "much too loose and vague to be considered in a court of law" (*Guthing v. Lynn* (1831)). Also a promise must not be illusory, that is, dependent upon conditions which reserve an unlimited option to one of the parties. In *Roberts v. Smuth* (1859), an agreement was made between A and B that A should perform certain services, and that in a certain event he should receive whatever remuneration B thought reasonable. The services were rendered and B refused to pay anything. It was held that A had no remedy which he could enforce against B. This decision has been adversely criticised, and it is unlikely that it would be followed at the present day. The law almost invariably implies that when one person undertakes to perform any work for another person there is at least a tacit agreement that the market price of the work shall be paid (*Jewry v. Busk* (1814)). When a cab-driver informs his "fare" that he "leaves it to him" what he is to receive for a journey, he certainly does not intend to accept less than the amount to which he is legally entitled (*Bryant v. Flight* (1839)). A mere moral obligation is of no legal value (*Eastwood v. Kenyon* (1840); *Beaumont v. Reeve* (1846)).

4. Must move from promisee

(4) The consideration must move from the promisee. Thus, A and B cannot enter into an agreement for the benefit of C in such a manner that C can enforce it. "No stranger to the consideration can take advantage of a contract, though made for his benefit" (*Tweddle v. Atkinson* (1861)). See also *Fleming v. New Zealand Bank* (1900).

5. Must be lawful

(5) The consideration must be lawful.

6. Must not be past

(6) The consideration must not be a past benefit. Generally speaking, services rendered in the past,

however valuable, are not a sufficient consideration to support a promise. In one case the plaintiff sued the defendant on a warranty as to the soundness of a horse. In his statement of claim he set out that the defendant had warranted the horse was sound in consideration that he (the plaintiff) had bought it. It was held that the consideration was past, and could not support the defendant's promise (*Roscorla v. Thomas* (1842)). In some cases, however, it is possible for a plaintiff to sustain a claim founded upon a past consideration, but generally in order to do so he must show that the services rendered were at the request, express or implied, of the defendant. For example, a man once requested a friend to take certain journeys and exercise his influence to secure a pardon for a criminal offence which the former had committed. After the work had been done and the services rendered, the friend was promised a sum of £100 for his services. It was held that the promise was binding, although the consideration was past, because the defendant had requested the plaintiff to do the work (*Lampleigh v. Brathwait* (1616)).

Certain other examples are often given where past consideration supports a simple contract, but each case can be shown to be based on some such ground as implied request. The following are the chief examples—

(a) Where the consideration consists in the plaintiff having been compelled to do what the defendant was legally bound to do (*Jefferys v. Gurr* (1831); *Grissel v. Robinson* (1836)).

(b) Where the plaintiff has voluntarily done what the defendant was legally compellable to do, and the defendant has, in consideration of the same, expressly promised (*Wing v. Mill* (1817); *Paynter v. Williams* (1833)).

(c) Where the defendant has adopted and enjoyed the benefit of the consideration (*Eastwood v. Kenyon* (1840)).

(d) Where a debt has become barred by the Statute of Limitations, a subsequent promise to pay it, even without consideration, revives the debt. Here, indeed,

the ground for the exception appears to be based on the fact that it is the remedy and not the right that is barred and that the debtor has the option to adopt the benefit of the Statute of Limitations or not at will. So that the acknowledgment to the creditor is, in effect, the communication of the debtor's decision not to adopt the benefit of the Statute.

CHAPTER V

LEGALITY AND POSSIBILITY

No agreement is of any legal effect if it is unlawful in any of its terms, or if it contemplates the prosecution of anything which is unlawful in its result. It makes no difference whether the contract is one under seal or only a simple contract. In either case such a contract is void.

Legality. It is not merely the liability to punishment, or other legal penalty, which makes an agreement unlawful. An agreement may also be null and void if it is opposed to public policy, or is expressly made void by statute law. There is always a presumption of law, however, in favour of the legality of a contract. If a contract is reasonably capable of two meanings—one legal and the other not—that interpretation is adopted which makes it operative (*Mittelholzer v. Fullarton* (1842)). The party who desires to set aside a contract on the ground of illegality must prove the illegality (*Hire Purchase Furnishing Co. v. Richens* (1887)). But if the contract is clearly illegal, the court will deal with the illegality, whether it is pleaded or not, and will not help either party to an illegal contract (*Scott v. Brown* (1892)).

Presumption
in favour of
legality

Agreements to Commit a Crime or a Civil Wrong.

Any agreement to commit a crime is, of course, void, and so also is an agreement to commit a civil injury, that is, an injury for which damages may be recovered in a court of law. Again, an agreement is equally invalid if it has for its object the payment of money, or the transfer of property, in aid of an illegal purpose. For example, it is a criminal offence to compound a felony, that is to refrain from prosecuting an offender. An agreement, therefore, to lend money for the purpose of applying it in compounding a felony is void. The holding of lotteries is a criminal offence. Any agreement, therefore, to subscribe to a lottery, or to pay

Examples

a prize gained therein to a winner is void. Again, all agreements which have for their purpose the defrauding of third parties are void. If, therefore, a man who is heavily indebted enters into an arrangement with his creditors by which he agrees to pay them a certain portion of their debts in full satisfaction of the whole, he cannot favour one creditor at the expense of the rest. An agreement to pay a larger composition to one than to others is void, that is, of course, unless all the others consent to such a thing being done.

It has not been thought necessary to increase the number of instances of illegal agreements given in the preceding paragraph, and seeing that the subject has been so lightly and generally touched upon, it has not been thought worth while to refer to the statutes and cases which bear out the statements made in the text. Strictly speaking, any agreements of the kind specified, excepting the last, have very little connection with mercantile law, but they cannot be altogether neglected in any work which deals, however generally, with contracts. It may be noticed that a partnership in a betting and bookmaking business can legally exist (*Jeffrey & Co. v. Bamford* (1921)).

Public Policy. It is not easy to define "public policy," since the term must have different meanings at different times; but it may be broadly stated that the contracts which are held to be opposed to public policy are those which it is deemed not advisable to recognise on the ground that they are opposed to the public interest. In *Besant v. Wood* (1879), Jessel, M.R., used the following words: "You cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a judge might be as to what public policy is."

Meaning of
public policy

At one time there was a strong disposition to interfere with contracts which were supposed to offend against public policy, but the reverse is now the case, and in 1891 Cave, J., said in *In re Mirams* (1891): "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."

Attitude
of courts
towards
public policy

Consequently, the number of contracts which are now held to be illegal on this ground is comparatively small, and must become less if the *dictum* of Lord Davey, in *Janson v. Driefontein Consolidated Mines Limited* (1902), is acted upon: "Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline."

The case of *Montefiore v. Munday Motor Components Co., Ltd.* (1918), will serve as a good illustration of the principle in question. The defendants agreed to pay 10 per cent on money obtained for them by the plaintiff, to be used as capital in their business of manufacturers of aircraft components. The plaintiff undertook to obtain the money through his alleged connection and influence with officials of the Government on the Air Board. An advance was, in fact, made by the Government, and the defendants paid £100 because they "thought the plaintiff was working in their interests, and helping them to get the money they required." They refused to pay commission on further amounts advanced, alleging that these were obtained from the Government by their own direct negotiations. Shearman, J., found that the bargain was that the plaintiff should exert his influence with servants of the Crown in order to induce an advance of public money to the defendants, and that this was the true consideration for the commission note which had been given. He held, therefore, that the contract was illegal and void as contrary to public policy.

Examples

Influencing
servants of the
Crown

Trading agreements made with aliens who are the natural-born subjects of a country at war with this country are invalid. It should, however, be observed

Trading with
enemy aliens

that this rule is relaxed if a licence has been obtained from the Crown to trade with the enemy. Contracts entered into before the outbreak of hostilities between the subjects of different states are, however, only suspended and not terminated during the continuance of the war where it is reasonable in the circumstances that they should be suspended.

Contracts for
payment of
penalties

Other contracts which are considered to be opposed to public policy are those which stipulate for the payment of penalties under certain conditions. Sometimes the parties to a contract agree as to the sum of money to be paid in case there is a breach of the agreement, and give to the sum agreed upon the name of "liquidated damages." But the law will scrutinise agreements of this kind with great jealousy, and, following the principles of equity, will grant relief whenever it is clear from the facts of the case that the payment is, in spite of its name, not the amount of damages which have been sustained, but in reality a much larger sum, and therefore a penalty (**Kemble v. Farren** (1829)). The question was raised but left undecided in *Cellulose Acetate Silk Co. v. Widnes Foundry* (1925), Ltd. (1932), whether, if a penalty stipulated for is less than the actual damage sustained, the party may demand the actual loss to be made good and reject the penalty. Where a single lump sum is made payable as compensation on the occurrence of one or more or all of several events, some of which may cause serious and others only trifling loss, there is a strong presumption that the sum is a penalty (*Elphinstone v. Monkland Iron & Coal Co.* (1886)).

Contract to
perform act
illegal under
foreign law

An agreement which has for its primary purpose the breach of international comity is contrary to public policy and therefore void. Thus in *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll* (1929), an agreement as to the export of whisky into the United States was held void.

In *Bradstreets British, Ltd. v. Mitchell* (1932), a contract between a commercial inquiry agency and a trading company provided for the supply of information

as to the financial stability of companies and firms, and further provided that the information was supplied in strict confidence for the exclusive use of the trading company and the trading company undertook in no circumstances to reveal the nature of the information. The trading company agreed to indemnify the inquiry agency in respect of loss or damage from a breach by the company of these conditions. This contract to indemnify was held to be valid and not against public policy, in spite of the fact that the object of the indemnity was to protect the agency against libel actions.

Contracts involving maintenance and champerty are void as being opposed to public policy. The former consists of intermeddling with, or supplying funds for the purpose of carrying on, the lawsuit of another, whilst the latter is an agreement whereby one party supplies the necessary funds for an action and bargains for a share of the benefit to be derived. A person injured may bring an action against a maintainer (*Bradlaugh v. Newdegate* (1883); *Neville v. London Express Newspapers, Ltd.* (1917)).

Maintenance
and
champerty

Restraint of Trade. Contracts which tend to place any undue restraint upon trade are regarded with suspicion. The reasons for holding contracts in general restraint of trade to be void were stated concisely in an American case in 1837, which practically repeated those given in the well-known English leading case of *Mitchel v. Reynolds* (1711).

Reasons for
invalidity of
contracts in
restraint of
trade

"1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

"2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves.

"3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

"4. They prevent competition and enhance prices.

"5. They expose the public to all the evils of monopoly."

Requisites
for valid
restraint of
trade

The history of the subject is extremely interesting, but too lengthy to be attempted in any work which is not specially devoted to the purpose. Starting with the assumption that the utmost freedom of trading should exist, by degrees it came to be held that a partial restraint might be allowed, provided there was a limit of time and space, and that there was also some consideration for the restraint. (It is an exception to the general rule as to deeds that even though the agreement in restraint of trade is under seal, there must still be a consideration to support it.) In course of time the test of validity has changed and the limits of time and space are not regarded as essential to the validity of a contract in restraint of trade. It was held in the case of **Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.** (1894) that the only justification of a contract in restraint of trade was reasonableness. It must be reasonable in reference to the parties concerned, and reasonable in reference to the interests of the public. Further, it is now only necessary that there should be legal consideration of value for a contract in restraint of trade; formerly adequate consideration was required. Of course the *quantum* of consideration may enter into the question of the reasonableness of the contract.

Must be
consideration

Must be
reasonable

More liberal
construction
of contracts
in restraint
of trade now
favoured

The invention of railways, the telegraph, and the telephone, have thus compelled the courts to give a more liberal construction to contracts of this kind than they would have done seventy-five years ago. A business man is not now confined to a narrow limit, but may have connections in all parts of the world. He might, therefore, be a serious loser at various times if his clerks, agents, or employees were able to set up in business and compete with him. For this reason when an employee is taken into service in a firm with a large business connection, it is generally made a term of the

contract of employment that he shall not enter into the same or a similar business to that carried on by his employer for a fixed period, or within a limited district, for a certain number of years after the termination of his engagement. A similar kind of agreement is entered into in most cases between the vendor and the purchaser of the goodwill upon the sale of a business, the vendor covenanting not to compete with the purchaser for a certain time within a specified district. (See page 165, *post*.) The object in both cases is to prevent undue competition. Unless the restraint imposed is considered in all the circumstances too harsh, the agreement will be held to be good.

Sometimes an agreement of this kind will be held to be partly good and partly bad. Thus, in one case the defendant covenanted with his employers that after he left their service he would not practise as a dentist in London, or in any other place in England or Scotland where they might have been practising. The agreement was held to be good as to London, but bad as to all other places (*Mallan v. May* (1843)). In *Mason v. Provident Clothing & Supply Co., Ltd.* (1913), Lord Moulton laid down the rule that the court should only enforce part of a covenant in restraint of trade where the part so enforceable was clearly severable, and even then only when the excess was of trivial importance or merely technical and not a part of the main purport and substance of the clause.

Agreement
partly good
and partly bad

The chief authorities upon the subject of restraint of trade and the general policy of the law were fully discussed in *Davies v. Davies* (1887). In that case a restriction "as far as the law allows" was held to be too vague to be enforced. As to vagueness, see the cases of *Dubowski v. Goldstein* (1896), and *Stride v. Martin* (1898). But one of the latest and most important expositions of the modern law as to such contracts is to be found in the case of **Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.** (1894), already referred to. There a patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company

Nordenfelt
case

to which his patents and business had been transferred that he would not for twenty-five years engage, except on behalf of the company, either directly or indirectly, in the business of a manufacturer of guns or ammunition. It was held that although the covenant was unrestricted as to space, yet, having regard to the nature of the business and the limited number of customers, viz. the governments of this and other countries, it was not wider than was necessary for the protection of the company, nor injurious to the public interests of this country, and that it was therefore valid.

No previous authority was expressly overruled by the *Nordenfelt* case, but the various judgments recognised the gradual growth of the law upon the subject which had been taking place, and the wider nature of the restraint which is allowed at the present day. The following extract from the judgment of Lord Macnaghten is worthy of perusal: "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable, reasonable that is in reference to the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that the result was reached all at once. The law has changed much even since *Mitchel v. Reynolds*. It has become simpler and broader too. . . . The court ought not to hold the contract void unless the defendant made it plainly and obviously clear that

the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed if the proposed restraint were upheld."

The question of the reasonableness or the unreasonableness of any restraint is one for the court and not for the jury (*Dowden & Pook v. Pook* (1904)). In any case the restraint must be limited to a business which is a competing one (*Ehrman v. Bartholomew* (1898)).

Reasonable-
ness a
question of
fact

If the restraint is valid, it is enforceable by injunction even though the parties may have agreed as to the damages to be paid in case of a breach thereof (*National Provincial Bank of England v. Marshall* (1888)).

Restraint
enforced by
injunction

The rules as to restraint of trade do not apply to the disclosure of trade secrets. A covenant not to disclose the secrets of a business may be of world-wide extent.

Disclosure of
trade secrets

There is a difference in the application of the doctrine of restraint of trade which depends upon whether the contract is as between master and servant or as between the vendor and purchaser of a business. The court is more suspicious of a contract between master and servant, which binds the servant not to engage in competition with the master, than in the case of a contract which merely protects the goodwill of a business from competition by a vendor. An excellent example of this is found in the case of **Morris (Herbert) Ltd. v. Saxelby** (1916), in which a covenant in the following terms, entered into by a person engaged by a firm as an engineer, was held wider than was required for the protection of the firm, and therefore unenforceable: "The employee covenants and agrees with the company . . . that he will not at any time during the period of seven years from the date of his ceasing to be employed by the company . . . either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise . . . in the sale or manufacture of pulley blocks, hand overhead railways, electric overhead railways . . ."

Restraint
to protect
goodwill

Restraint as
between
employer and
employee

The principle laid down in **Morris (Herbert) Ltd. v. Saxelby** (1916) was applied in *Attwood v. Lamont* (1920),

where Lord Justice Younger laid down the rule that an employer may not, after his servant has left his employment, prevent that servant from using his own skill and knowledge in his trade or profession.

In **Vincent v. Fogden** (1932), two principles of the law as to restraint of trade between employer and employee were set out—

1. A person seeking to enforce an agreement must show that it goes no farther than is reasonably necessary for the protection of his business.

2. An employer must not take from an employee a covenant which protects the employer after the employment has ceased from the competition of his former servant.

Examples of
restrictions

It can be seen that no definite rules can be laid down to test whether a contract in restraint of trade is enforceable or not. It is a question of fact in each case. The following restrictions have been held good: A contract by a solicitor not to practise in any part of Great Britain (*Whittaker v. Howe* (1841)), by a surgeon not to practise within seven miles of a certain country town (*Sainter v. Ferguson* (1849)), and by a publisher not to carry on his business within one hundred and fifty miles of the General Post Office, London (*Tallis v. Tallis* (1853)). But a contract by a dentist not to carry on his practice within one hundred miles of York was held to be bad (*Horner v. Graves* (1831)), and again, a contract by a cashier employed at a dairy not to trade within twenty miles of a certain place for one year was held invalid when its terms prevented him from trading as a manufacturer of dairy utensils, which his former employers were not manufacturing at the date of the agreement (*Great Western & Metropolitan Dairies v. Gibbs* (1918)). It should be noticed that the last case was between employer and employee, while the others were concerned with goodwill.

Combinations
in restraint
of trade

As a general rule it may be laid down that a combination of two or more persons wilfully to injure a man in his trade is unlawful. If, however, the real object is not to injure another but to forward or defend the

trade of the parties entering into it, no wrong is committed.

The whole subject, however, is one of considerable difficulty and the decisions are to a great extent conflicting. One of the most recent cases is *Sorrell v. Smith* (1925), and in that case the rule as set out above was laid down. The facts of the case were that certain wholesale newsagents threatened to withdraw supplies from a tradesman unless he ceased to supply a particular person. The object was not the injury of that person but to further the interests of their own business. The House of Lords held that the person who was refused supplies had no cause of action. In giving judgment, Lord Dunedin attempted to clear up some of the confusion surrounding the subject. In the following extract, from a previous judgment of his, which he repeated in the House of Lords, he states the effect of the three leading cases on the subject, **Mogul S.S. Co. v. McGregor, Gow & Co.** (1892); *Allen v. Flood* (1898); and *Quinn v. Leatham* (1901): "In the first place everyone has a right to conduct his own business upon his own lines, and as suits himself best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen v. Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy, where they would not have been illegal if done by a single individual. I think that is the result of *Quinn v. Leatham*."

North Western Salt Co. v. Electrolytic Alkali Co. (1913) affords an illustration of a contract in restraint

of trade (to regulate supply and keep up prices) not being illegal because the court held that an ill-regulated supply and unremunerative prices may be disadvantageous to the public.

The position of trade unions, it should be noticed, is stronger than that of most combinations, by virtue of the Trades Union Acts (see *Evans v. Heathcote* (1918), referred to below).

Reference may usefully be made in connection with restraint of trade to the case of *Elliman v. Carrington* (1901). The plaintiffs, who are well-known manufacturers of an embrocation, sold a quantity of their goods to the defendants under a contract whereby the latter agreed not to sell them for less than a specified price, and also to procure a similar agreement from any retail dealers whom they might supply. The defendants failed to obtain such agreement from the retail dealers. It was held that the covenant in the contract was not in restraint of trade, and that the plaintiffs were entitled to maintain an action against the defendants in respect of the breach of it.

Another interesting case dealing with restrictions on the price at which goods may be sold is *Palmolive Co., Ltd. v. Freedman* (1928), where, in consideration of being placed on the plaintiffs' wholesale list and allowed their wholesale discount, the defendant agreed not to sell Palmolive soap, "however acquired," to the public at under sixpence a tablet. The court held that as the agreement only imposed restrictions in respect of particular proprietary articles with which neither the defendant nor the public were compelled to deal, the agreement was not injurious to the public. It was further held by a majority of the court that though the agreement was unlimited in time and space and extended to the particular class of goods "however acquired," it was not in the circumstances unreasonable.

The case of *Evans v. Heathcote* (1918) already referred to, shows the operation of sections 3 and 4 of the Trade Union Act, 1871 (34 & 35 Vict., c. 31), which render valid a contract which would, apart from the Act, be

Agreements
as to price

Trade
Union Act

void in law as being in restraint of trade. In this case there was a trade combination which had for its objects, *inter alia*, the control of prices under an agreement which restricted the output of its members, and provided that the profits of any excess over and above the restricted output, should be paid into a pool, out of which a percentage was to be paid to any member whose output in any month was less than his percentage as settled under the agreement. The Court of Appeal, following the judge of first instance, decided that the restraint imposed was unreasonable as between the parties, and, therefore, invalid at common law, but that as the combination was a trade union, within the definition section of the Trade Union Act, 1876 (39 & 40 Vict., c. 22), the Act of 1871 applied and there was no relief against the restraint imposed by the combination. The position thus created is, to say the least, somewhat anomalous and may have far-reaching consequences, as it will be perceived that, so long as this decision holds, a contract made by a trade union in restraint of trade is not a void contract, affording no foundation for a valid claim, but a valid contract upon which a valid claim can arise although such claim cannot be directly enforced.

Agreements Void by Statute. Certain contracts have been made invalid by various Acts of Parliament. Such are those which offend against the provisions of the Truck Acts of 1830, 1887, and 1896 (1 & 2 Will. 4, c. 37; 50 & 51 Vict., c. 46; and 59 & 60 Vict., c. 44), by which it is forbidden (*inter alia*) to pay the wages of workmen otherwise than in money; the law against Sunday trading, Sunday Observance Act, 1677 (29 Car. 2, c. 7); and the Banking Companies (Shares) Act, 1867 (30 & 31 Vict., c. 29), commonly called Leeman's Act, which renders void the sale of shares in a joint stock banking company, unless the contract sets out in writing the numbers of the shares as stated in the register of the company.

Gaming and wagering contracts are invalid, the two statutes in force upon the subject being those of 1845

Truck Acts

Sunday trading

Gaming and wagering

(8 & 9 Vict., c. 109) and 1892 (55 Vict., c. 9). It must not be forgotten that gaming contracts are not illegal; they are simply void. And money obtained by means of wagering contracts through the instrumentality of an agent may be recovered by a principal (*De Mattos v. Benjamin* (1894); *O'Sullivan v. Thomas* (1895)), and the principal cannot recover a fine paid to an agent to indemnify him against betting losses (*Maskell v. Hill* (1921)). This may be illustrated as follows. If A employs B to make a wager, A has no right of action against B if B fails to make the same. But if B does enter into a wagering contract and wins, the money he obtains must be paid over to A, and A can enforce payment thereof by action. Formerly section 2 of the Gaming Act, 1835, made it possible to recover a negotiable instrument paid in discharge of gambling debts. This is now prevented by the repeal of the section (Gaming Act, 1922 (12 & 13 Geo. 5, c. 19)).

A wagering contract is defined in *Carlill v. Carbolic Smoke Ball Co* (1893) as "one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

This definition is quoted with approval and considered in *Ellesmere (Earl) v. Wallace* (1929), where many of the cases on wagering are reviewed.

Stock
Exchange
transactions

Contracts made on the Stock Exchange for the sale and purchase of stocks and shares, where it is intended that no stocks shall be delivered but that "differences" only shall be accounted for, are, in the eye of the law, wagers, and as being such are consequently void (*Universal Stock Exchange v. Strachan* (1896); *In re Gieve* (1899)). Money deposited as cover for differences in such a transaction in stocks and shares cannot be

recovered where it has been appropriated to meet losses with the knowledge of the client, and the whole amount of the deposit has been appropriated before the notice to terminate the gambling transaction (*Strachan v. Universal Stock Exchange* (No. 2) (1895)). It is otherwise where the deposit is not appropriated (*In re Cronmire, Ex parte Ward* (1898)). Securities deposited to secure the payment of differences are not deposited to "abide the event" within sect. 18 of the Gaming Act, 1845, and are recoverable by action (*Universal Stock Exchange v. Strachan* (1896)). It was held in *Grizewood v. Blane* (1852) that the question may be left to the jury: "Did either party intend to buy or sell?" and if neither party intended to buy or sell, the transaction is gambling.

A contract to purchase foreign currency may come within the Gaming Act, 1845. It is a question of fact whether there is a genuine contract to deliver the currency, which is valid, or merely a contract for the payment of differences (*Ironmonger v. Dyne* (1928)).

Purchase of
foreign
currency

There are various other statutes under which contracts for the sale of certain goods, such as game, intoxicating liquors, bread, coal, and corn, are subject to particular regulations, but they need no further reference here. Note, for example, that sales of corn in quantities over one hundredweight are void, with few exceptions, unless by weight in terms of hundredweights (Corn Sales Act, 1921, 11 & 12, Geo. 5, c. 35).

If one party to an unlawful agreement has paid money to the other party for the purposes of the agreement, he may repudiate his agreement and claim repayment of his money, but only if nothing has been done in connection with the performance of the agreement (*Taylor v. Bowers* (1876); *Kearley v. Thomson* (1890)).

Recovery of
money paid
under
unlawful
agreement

Possibility of Performance. The contract must be one which is capable of being performed at the time when it is made. An undertaking to perform an impossibility renders a contract void for want of sufficient consideration.

There are three kinds of impossibility to be noticed—

Absolute
impossibility

(1) Absolute impossibility. This is the case of an agreement to perform a thing which is incapable of performance by the laws of nature, as an undertaking to fly to the moon, or to circumnavigate the globe in an hour.

Legal
impossibility

(2) Legal impossibility. This is the case where an act is positively forbidden by the law of the land.

Actual
impossibility

(3) Actual impossibility. This is the most important of the three. It arises where parties have contracted as to a certain thing which, without their knowledge, is non-existent at the time of entering into the contract.

Subject-
matter
non-existent

A good illustration is provided by the case of **Couturier v. Hastie** (1856). In that case two parties bargained as to a cargo which was supposed to be on a voyage. It subsequently transpired that it had ceased to exist owing to perils of the sea. It was held that the contract was void. See also *Strickland v. Turner* (1852), where money paid under a contract to purchase an annuity which, unknown to the parties, had ceased to exist at the time the contract was made, was held to be recoverable, as there was no consideration; and *Kennedy v. Thomassen* (1929), which was a similar case of a contract to purchase an annuity. Impossibility of performance may also arise after the making of the contract. In such a case, as a general rule, this does not put an end to the liabilities of the parties. The subject of impossibility arising subsequently to the making of the contract is dealt with under "Discharge of Contract," at page III, *post*.

CHAPTER VI

MISTAKE, MISREPRESENTATION, AND FRAUD

It has been pointed out that in order to form a contract there must be an agreement of two minds in the same sense and upon the same subject-matter. This is a condition precedent to the formation of any contract. The parties must know what they are bargaining about, and if it can be clearly shown that there was a misapprehension on the one side or the other, the contract entered into will be, in some cases, invalid or voidable. And if, moreover, it is shown that the contract was based upon a misapprehension of facts by both parties, it will certainly be void, and any money paid under it may be recovered (*Cochrane v. Willis* (1865); *Huddersfield Banking Co. v. Lister* (1895)).

Parties must
be *ad idem*

Mistake. An illustration of this is furnished by the case of *Scott v. Coulson* (1903), where a contract for the sale of a policy of life insurance was set aside by the court, on the ground that when the contract was entered into both the vendor and the purchaser believed that the assured was alive, although in fact he was dead. It was also held that such a contract could be rescinded even after it had been completed by the assignment of the policy. But the mistake which will affect the validity of a contract must not be confounded with the popular meaning of the word "mistake." The mistake must be "vital operative mistake"; that is, it must go to the root of the contract, and, further, the rule applies only to what are called mistakes of fact. If it were otherwise the majority of people would probably endeavour to get out of their liabilities on the ground that things had turned out contrary to their expectations, and that they had been mistaken. Thus, in the case of *Van Praagh v. Everidge* (1902) (following *Chambers v. Miller* (1862)), a man went to an auction room and made a bid for a certain lot, being under the impression that he was bidding for some lot other than

Mistake of
fact

that which was put up for sale. He did not discover his error until the hammer had fallen. It was held that he was bound to complete the sale, and an order for specific performance was made against him.

Rule
regarding
mistake

The rule of law was clearly stated in the case of **Smith v. Hughes** (1871), in which it was proved that the defendant had purchased certain goods upon a mistaken view of the character of the sample of the same, and that the seller had not undeceived him as to their quality. In the course of his judgment Blackburn, J., said that the whole matter was to be judged from the standpoint of what a reasonable man would infer from the manifest conduct of the parties to the contract, irrespective of their real intentions. If it was natural to conclude from such conduct that one of the parties had assented to the terms proposed by the other, the contract was valid.

*Ignorantia
juris
neminem
excusat*

Recovery of
money paid
under
mistake

No agreement, which in other respects contains all the ingredients of a valid contract, is invalid because of a mistaken construction of the law. A person who has full knowledge of all the material facts of a case cannot plead ignorance of the legal effects of an agreement. The maxim of law is *ignorantia juris neminem excusat* (ignorance of the law excuses no man). Similarly, although money paid under a mistake of fact may be recovered (*Imperial Bank of Canada v. Bank of Hamilton* (1903)), that paid under a mistake of law is irreclaimable (*Bilbie v. Lumley* (1802); *Milnes v. Duncan* (1827); *Platt v. Bromage* (1854)). Thus, in the leading case of **Marriott v. Hampton** (1797), an action was brought to recover the price of goods sold and delivered. The defendant declared that he had paid for them, but he was unable to produce a receipt. He was, therefore, compelled to pay a second time; and when, a little later, the receipt turned up, he was unable to recover his money from the seller of the goods. The decision may appear a harsh one, but it is based upon the principle that unless some limit were fixed, contests in the courts might go on interminably.

But it must be recollected that the doctrine that

money paid under compulsion of legal process cannot be recovered will not be allowed to prevail if it appears that there has been an absence of *bona fides* on the part of the original creditor. Thus, in the case of *Ward & Co. v. Wallis* (1900), the plaintiffs sued the defendant for work and labour done. On the writ the plaintiffs by mistake credited the defendant with the payment of a sum on account, and claimed only the balance due to them. The defendant was fully aware of the mistake which had been made, and with this knowledge he paid the balance and obtained a receipt from the plaintiffs for the whole sum due from him to them. Subsequently, having discovered their error, the plaintiffs brought an action to recover from the defendant the sum wrongfully credited to him on the writ, as money had and received to their use. It was held that, although the receipts had been given under compulsion of legal process, the defendant could not rely upon it as a defence to an action since he had not acted *bona fide*, and that the plaintiffs were therefore entitled to recover the sum claimed.

Necessity for
bona fides

The rule as to mistakes of law was not so inflexible in equity as at common law, and since the Judicature Act, 1873 (now the Supreme Court of Judicature (Consolidation) Act, 1925), the rule of equity prevails. Relief was generally obtainable in equity if it was shown that there existed some ground which made it inequitable for a party to retain money which he had received (*Stone v. Godfrey* (1854)). But the remedy will be applied very sparingly, and no relief will ever be given in those cases where a simple money demand is made by one person against another (*Rogers v. Ingham* (1876); *Ex parte Sandys* (1889)). The rule of law, moreover, is not applicable in cases of bankruptcy and the winding up of public companies (*Ex parte James* (1874); *Ex parte Simmonds* (1885); *In re Brown* (1886); *In re Opera Limited* (1891)). In addition, a distinction is made between general law and a particular right. Ignorance of the latter is not so fatal as ignorance of the former. The existence of a private right of

Relief in cases
of mistakes
of law

property is a question of fact (*Cooper v. Phibbs* (1867)).

Rectification
of written
agreement

In some cases the courts will allow a mistake in a written agreement to be rectified, if it is clearly shown that the agreement as it stands does not express the intentions of the parties (*Bentley v. Mackay* (1862); *Mackenzie v. Coulson* (1869); *Earl Beauchamp v. Winn* (1873); *Duke of Sutherland v. Heathcote* (1892)).

The principal mistakes of fact which are sufficient to invalidate a contract, otherwise regular upon the face of it, are the following—

Mistake as to
subject-
matter

(1) Mistake as to the subject-matter of the contract. This may refer either to the existence of the subject-matter (*Couturier v. Hastie* (1856); *Scott v. Coulson* (1903)), or to its identity (*Raffles v. Wichelhaus* (1864)).

In connection with mistakes as to the quality of the thing contracted for, Lord Atkin, in *Bell v. Lever Brothers, Ltd.* (1932), said that to affect assent the mistake must be "as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be." Thus in that case it was held that an agreement to terminate a definite specified contract is not void simply because the contract has already been broken and could have been terminated otherwise.

Mistake as to
parties

(2) Mistake as to the parties to the contract. This arises when one of the parties intending to contract with one person makes an agreement with another. Certainty is one of the essentials of a valid contract, and a mistake of this kind renders the agreement invalid. The well-known case of *Boulton v. Jones* (1857) is an illustration. The defendant had been in the habit of dealing with a man named Brocklehurst, and sent him an order for certain goods. On the day upon which the order was received Brocklehurst had transferred his business to the plaintiff, and the latter executed the order but gave no notice to Jones of the change in the business. It was held that an action by Boulton for the price of the goods was not maintainable. See also *Smith v. Wheatcroft* (1878), and *In re International*

Society of Auctioneers (1898), referred to at page 20, *ante*. It is to be assumed that the identity of the party dealt with is an important element in the contract. In *Gordon v. Street* (1899), it appeared that a well-known money-lender had carried on his business under various assumed names, and that he had induced the defendant, Street, to borrow money by a fraudulent concealment as to his own identity. It was held that the contract to repay was unenforceable against the borrower, since he had entered into it without knowing who was the real person with whom he was dealing.

(3) Mistake as to the nature of the contract. The most familiar example of a mistake of this kind is where a blind or an illiterate person is prevailed upon to sign a deed or other document under the mistaken belief that it is something altogether different. The mistake, which may amount to fraud on the part of some person or other, arises from the fact that the mind of the signatory does not accompany the signature. (**Foster v. Mackinnon** (1869); *Lewis v. Clay* (1898), the facts of which are dealt with at page 267, *post*.)

Mistake as to
nature of
contract

Where a contract has been entered into by mistake of such a kind that the law will interfere, the remedy aimed at is to replace the parties in the position they occupied previous to the formation of the contract. If nothing has been done under the contract, rescission is the proper course. If money has been paid an order will be made for it to be refunded. But unless the parties are unwilling the court may order rectification instead of rescission, the terms of the contract being altered so as to agree with the terms originally intended by the parties themselves.

Remedies for
mistake

Misrepresentation. Before any contract is entered into the parties will most probably have been in negotiation, and certain statements, inducing the contract, will have been made on one side or the other. As a general rule an erroneous statement is not actionable unless it is intentionally false (**Dickson v. Reuter's Telegram Co.** (1877)). In the case of certain contracts, e.g. insurance (as to which see the chapter on that

Contracts
uberrimae
fidei

subject), the representations made are of the highest importance, and the fullest disclosure of all material facts is required. Such contracts are said to be *uberrimae fidei*, that is contracts in which the utmost good faith is demanded. If the statements made turn out to be inaccurate, though not so to the knowledge of the person who makes them, there will arise what is called misrepresentation, and the contract will be voidable at the option of the person damnified, since his consent to the terms of the contract was obtained by representations which prevented him from having a full and proper knowledge of all the facts. In order, however, that misrepresentation may be a ground for the rescission of a contract, it must be shown that the misrepresentation is one of fact, and not of law, that it was made by one of the parties to the contract, and that the contract itself was induced by the other party relying and acting upon the misrepresentation.

Duty to use
prudence and
forethought

Cases of misrepresentation arise very frequently, and as the facts are often extremely complicated, it is a difficult matter, without carefully sifting the whole evidence, to say what will suffice to avoid a contract on this ground. When a man intends to enter into a bargain he must use foresight and ordinary prudence, and he cannot expect much sympathy—the law certainly will not sympathise with him—if his bargain turns out to be less favourable than he imagined it would be, especially if when he has had every opportunity of examining the whole matter for himself, he has nevertheless trusted blindly to the statements of others. Thus, upon the sale of a business, the vendor may make an honest statement of opinion, although quite incorrect, as to the nature and prospects of the business, or he may praise it unduly. This conduct creates no liability, the maxim of law being *simplex commendatio non obligat*. It is the duty of the purchaser to make further inquiries himself. If he fails to make the representations of the vendor a term of the contract, or if he neglects to examine the books, to inspect the stock in trade, or to attend to any of the matters which

would naturally occur to the mind of an ordinarily prudent man, there is no ground for relief. Silence does not amount to a misrepresentation. If a purchaser makes inaccurate statements about the goods he is purchasing and the vendor remains silent, he is not liable for misrepresentation, as he has ordinarily no duty to disclose everything affecting the contract (*Seddon v. North Eastern Salt Co., Ltd.* (1905)).

The remedy in case of misrepresentation, if it is of such a character that the law will grant relief, is rescission of the contract, the parties being replaced, as far as possible, in the positions they occupied at the time the contract was entered into (*Redgrave v. Hurd* (1881); *Adam v. Newbigging* (1888); *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899)). The application for relief must be made promptly, or it may be refused (*Erlanger v. New Sombrero Phosphate Co.* (1879); *In re Cape Breton Co.* (1885); *Ladywell Mining Co. v. Brookes* (1887)). But if the misrepresentation, or the untrue representation, amounts to a warranty, or if it is a condition precedent to the contract, the injured party may, instead of seeking rescission, prosecute an action for damages.

Remedies for
misrepresentation

Fraud. When a misrepresentation is made by a party with a full knowledge that it is untrue, or without belief in its truth, or recklessly, not caring whether it is true or false, this is said to amount to fraud at common law. The law upon the subject was finally settled by the House of Lords in *Derry v. Peek* (1889). In that case, the directors of a tramway company had stated in their prospectus that they had a right to use steam power in the working of their carriages. In point of fact, the right to use steam power was subject to the sanction of the Board of Trade, which the directors honestly believed that they would obtain. The permission was not given. It was held that as the statement in the prospectus was made honestly in the belief that it was true, there was no fraud. The learned and exhaustive judgment of the late Lord Herschell in that case is worthy of the most careful study.

Fraud
defined

Directors' liability

After the decision in **Derry v. Peek**, the position of directors of joint-stock companies, with respect to fraudulent misrepresentation, was changed by the passing of the Directors' Liability Act, 1890 (53 & 54 Vict., c. 64). This Act, as well as the amending section of the Companies Act, 1907, is now incorporated in sect. 37 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23). If a charge of fraudulent misrepresentation is now made against directors, it is not for the plaintiff to prove that the directors had no grounds for believing in the truth of the statements contained in the prospectus, but for the directors to show that they had good grounds for making them.

Promoters of a company, and persons who have had any part in the issue of the prospectus of a company, are in the same position as directors. As far as other persons are concerned the law remains as it was laid down in *Derry v. Peek*.

Nature of fraud in contract

Fraud is also a ground for relief in Equity, and Equity judges have said that fraud is so far-reaching in its effects and so infinitely varied in its form that it is impossible to lay down any definition of it which will cover all cases. In order to avoid a contract on the ground of fraud, the fraudulent statement complained of must be one of fact and not of law, must have been made by one of the parties to the contract, and must have been the cause of the contract being entered into. The misrepresentation must have actually deceived the party injured, and some damage must have been suffered. It should be noticed that the fraudulent misrepresentation need not be made directly to the person deceived. Thus, in the case of *Andrews v. Mockford* (1896), it was held that where a prospectus was issued not merely for the purpose of inviting persons to subscribe for shares, but also of inducing persons to purchase the shares of the company which were already in the open market, the office of the prospectus was not exhausted upon the allotment of the shares; and that any one who, having received a prospectus, afterwards purchased shares in the open market, relying entirely

upon the false representations contained in the prospectus, had a cause of action against the promoters for the fraudulent misrepresentation.

Since the state of a man's mind is a matter of fact, a person cannot shelter himself behind a declaration that he made a statement honestly believing it to be true, when in fact he is wilfully misrepresenting the state of his own mind. This, however, is a question of evidence.

When a case of fraudulent misrepresentation is clearly made out, the injured party has the option of upholding the contract or of seeking to set it aside. The contract itself is not void but voidable. If it is intended to uphold the contract, there is a right of action for damages which have been sustained by the fraudulent misrepresentation. If he intends to avoid the contract, the defrauded party must act promptly and give notice to the other parties to it (**Clarke v. Dickson** (1858)). But if any advantage has been taken or derived by third parties as a result of the contract it cannot be avoided, and the same is true if circumstances have so altered the state of affairs that the original position of all concerned cannot be restored.

Remedies
for fraud

Undue Influence and Duress. Undue influence and duress are subjects closely allied to those discussed in the present chapter. The former consists in the improper exercise of a power possessed over the mind of one of the contracting parties by the other, and in certain classes of cases it is presumed, e.g. where a young person contracts in favour of his parent. Duress signifies actual or threatened violence to the person, or a restraint of personal liberty so as to deprive the contractor of his free-will, or an abuse of legal proceedings, if such proceedings are of a criminal nature. In either case the party coerced may avoid the contract.

Undue
influence and
duress
defined

As to what will actually constitute undue influence or duress, the facts of each particular case must be examined. In *Scott v. Sebright* (1886), Butt, J., said, "It has been sometimes said that in order to avoid a contract entered into through fear, the fear must be

such as would impel a person of ordinary courage to yield to it. I do not think this an accurate statement of the law. Whenever from natural weakness of intellect, or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in an uncertainty of the law on the subject, but in its application to the facts of each individual case."

Duress not relating to person of contractor

As showing that the duress need not be actually of a physical kind, and that it may not relate even to the person of the contractor, reference should be made to *Seear v. Cohen* (1881). In that case Denman, J., said "I think it must be regarded as the law that if a man asserts to the father of a debtor that his son is liable to a criminal prosecution, and the father is led by reason of that assertion to suppose that the fact is so, and by reason of that belief is led to give a promissory note, or to bind himself for the payment of a composition by the son, then and in that case the transaction is not a fair one. It is not to be looked at as a voluntary act, but as a case of extortion, whether the facts are in accord with the assertion or not." But if the duress does not relate to the contractor, it must affect the person of his wife or his children.

Ratification of contract entered into under duress

Subsequent acquiescence in a contract entered into by one of the parties when subjected to undue influence or duress, the undue influence or duress having been completely removed, will render the contract good in all respects (*Allcard v. Skinner* (1887)).

Rule of equity

Unconscionable Bargains. It has been a rule of equity for a long period to grant relief in the case of hard and unconscionable bargains entered into with expectant heirs and other needy persons. The leading cases of *Chesterfield v. Jansen* (1750); *Aylesford v. Morris* (1873); *O'Rorke v. Bolingbroke* (1877); and *Nevill v. Snelling* (1880), show the length to which

equity will go in setting aside such bargains. But although the rules of equity have been applicable to all the courts since the Judicature Act, 1873, the abolition of the usury laws in 1854 led to a new evil for which there was no proper legal redress, namely, the lending of money at exorbitant rates of interest by professional moneylenders. The excessive rates charged and the over-reaching methods adopted by the lenders led to the passing of the Moneylenders Act, 1900 (63 & 64 Vict., c. 51). The Moneylenders Act, 1900, was amended in 1911, but the Act of 1911 was repealed by an important amending Act of 1927 (17 & 18 Geo. 5, c. 21). It is unnecessary to notice in detail the provisions of the Moneylenders Acts, with the exception of sect. 1 of the Act of 1900 and sects. 6, 10, and 13 of the Act of 1927. Sect. 1 is as follows: "Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of the Act (1st November, 1900), or the enforcement of any agreement or security made or taken after the commencement of the Act, in respect of money lent either before or after the commencement of the Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable, and if any such excess has been paid, or

Moneylenders

Excessive
interest

allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given on agreement made in respect of money lent by the money lender, and if the moneylender has parted with the security may order him to indemnify the borrower or other person sued." The intention of the Act was to grant relief in those cases where equity would formerly have refused to interfere. The decision given in the first case which came before the courts after the passing of the Act, *Wilton v. Osborn* (1901), seemed to nullify this intention, but it was held by the Court of Appeal, in *In re a Debtor* (1903), that the court will set aside a bargain where the interest alone is excessive, and that no other consideration of unfairness or over-reaching is required in order to render it harsh and unconscionable. But what is "excessive" interest? Upon this point, and upon the lines the court should follow in moneylending cases, the judgment in *Smith v. Carrington* (1906) must be consulted.

Test to ascertain what is excessive interest

In that case, Channell, J., said: "The conclusion at which I arrive is that the judge is entitled to consider amongst 'all the circumstances of the case' the fact that the borrower thoroughly understood the transaction, and, without any misrepresentation or any pressure other than the mere request to pay so much interest, voluntarily agreed to pay it, and I myself think that when the judge finds these to be the facts, he ought to find that the interest which the man agrees to pay is reasonable, and, therefore, not excessive within the meaning of the Act. . . . I think I ought to add that this view of the Act in no way interferes with its operation in all the cases to which it was really meant to apply. Whether the borrower is in such a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free will—there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it. I ought further to say that if in this case

I found that the defendant had from the first intended not to pay the interest contracted for, but meant to lay a trap for the moneylender and take his money, and then, when he had repaid by instalments the amount of actual money received, to set up the Moneylenders Act and claim to be relieved from payment of the interest contracted for, I should hold that that conduct also would be a circumstance which I ought to take into consideration, and that I ought to hold in that case that it was most reasonable that he should pay what he contracted to pay. He was in a position to bargain on terms of equality with the moneylender. The argument of the defendant's counsel was based mainly on the absence of risk by reason of the defendant's ability to pay. If it were the case, which I am afraid often happens, of a borrower yielding to pressure put upon him by a moneylender taking advantage of his necessities, I should not say that the mere fact of his knowing of the Moneylenders Act and intending to try and get the benefit of it to relieve him of some part of what he had under pressure agreed to would entitle him to that relief; but for a man in the position this defendant was to take this loan on the plaintiff's terms, apply the money for the purpose for which he wanted it, and then turn round and say that he would not pay the agreed price of the accommodation because it was excessive, is a very different case, and I should have no hesitation in saying that as against him it was not excessive."

Sect. 10 of the Moneylenders Act, 1927, has remedied to some extent the failure of previous Acts to define "excessive" interest by providing that a rate in excess of 48 per cent shall be deemed excessive unless the contrary is proved. In *Parkfield Trust, Ltd. v. Dent* (1931) it was held that 160 per cent, though high, was not in the circumstances "excessive," and the fact that the borrower had made no objection to the rate could be taken into account by the judge.

Sect. 6 of the same Act provides that a contract for a loan or security is unenforceable unless a note was signed by the borrower *before* the loan was made or

Interest in
excess of
48 per cent

the security given. On renewal of a loan it is not necessary to go to the formality of repaying the old loan and receiving it back so that the memorandum may be signed before the loan is made (*Lyle (B. S.) Ltd. v. Chappell* (1932)). There is a time limit of twelve months for bringing actions to recover loans made after 1927 (sect. 13)

Who is a
"money-
lender"?

A moneylender is defined by sect. 6 of the Act of 1900, and does not include a pawnbroker, a friendly, benefit, or similar society, a banker, an insurance company, or any other person whose business has not for its primary object the lending of money

CHAPTER VII

RIGHTS AND OBLIGATIONS

A CONTRACT gives rise to certain rights and obligations. One of the parties to the contract has a right to demand that certain things shall be done, and the other is bound, so long as the contract subsists, to do them. But these rights and obligations cannot arise except between the parties to the contract, i.e. the parties between whom privity of contract or contractual relationship exists. A third party cannot come in and demand the performance of anything, even though the contract is really and wholly made for his benefit. For example, if A agrees with B, there being a consideration for the promise, that C shall receive a certain sum of money, C cannot enforce the payment of the sum agreed upon, or any other sum, since he is no party to the agreement. And it is equally clear that if A and B have agreed that C shall do some particular act, neither of them can compel C to do anything of the kind. The fact of an agent being employed to carry out an agreement is not an exception to the rule. It will be shown later, in the chapter on Agency, that the agent occupies the place of his principal, or employer, for many purposes.

Rights of
third parties

Just as a third person has no *locus standi* with regard to contracts entered into by other parties so as to benefit himself, he is similarly debarred from interfering with the contractual relationship entered into between them to their disadvantage. This part of the subject, however, belongs to the law of tort rather than to that of contract, and the reader is referred for full information to the cases of **Lumley v. Gye** (1853); *Temperton v. Russell* (1893); *Allen v. Flood* (1898); *Quinn v. Leatham* (1901); *Reed v. Friendly Society of Stonemasons* (1902); *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905); *Smithies v. National, etc., Plasterers* (1909). See also the Trades Disputes Act, 1906 (6 Edw. 7, c. 47).

Obligations of
third parties

Contract
binding on one
party only

A contract may be binding upon one party to a contract and not upon the other. Thus, a person who contracts with an infant may be under a legal obligation, though the infant is free (*Holt v. Ward* (1733)) and where there is a contract required to be evidenced by writing by the Statute of Frauds, the person who has signed the written document is bound, whilst no liability attaches to the person who has not signed (*Laythorp v. Bryant* (1836)). So also a person who tenders to supply goods to a firm may be bound to supply, if required to do so, though the firm is under no obligation to give orders (*Great Northern Railway Co. v. Witham* (1873); *Moon v. Mayor, etc., of Cambridge* (1904)).

Rights and
obligations
under a
contract are a
question of
evidence

What are the exact rights and obligations arising out of a contract is a question of evidence. If the contract is an oral one, the intentions of the parties must be gathered from all the circumstances of the case. If the contract is one which requires some note or memorandum in writing to make it enforceable, the construction of the document is for the court. It must be carefully borne in mind that when all the terms of a contract are reduced to writing, no evidence can be given to vary them. The terms have been set out deliberately, and the rights and obligations given or imposed must be found within the four corners of the document. Under certain circumstances, however, oral evidence is admitted to explain a document in writing (see page 88, *post*).

Construction. When it is necessary to give effect to the terms of a contract, whether those which have been proved in the case of an oral contract, or those contained in a written document, certain rules of construction must be observed, of which the following are the principal.

Intention
of parties
considered

(1) Whenever it is possible to do so, effect must be given to the intention of the parties. *Verba intentioni debent inservire*. But a party to an action who wishes to show what the intention was must have the strongest possible evidence to support his case (*Pannell v. Mill* (1846)).

(2) The construction must be reasonable. If words are omitted from a document by a clear mistake, they will be supplied to complete the sense. Thus, the word "hundred" has been inserted (*Waugh v. Bussell* (1814)) and also "pounds" (*Coles v. Hulme* (1828)). But no alteration would be allowed if any uncertainty existed as to the word which was missing. Again, if A enters into a contract to supply goods to B, B is not entitled to refuse the goods on the ground of their being insecurely packed, unless some damage has been done thereby. The contract is concerned with the goods, and it is unreasonable to apply it to the packing (*Gower v. Van Daelssen* (1837)).

Construction must be reasonable

(3) The construction should be liberal. Words used in the singular number may include the plural, and the use of the masculine gender may be understood to have reference to the feminine also. If a contract relates to the performance of a certain act, and one of the parties suggests a mode of performance and a special method of payment if that mode of performance is adopted, the performance in any other manner will not disentitle the party to be paid to maintain an action for what is due under the contract (*Read v. Meniaeff* (1849)).

Construction should be liberal

(4) The construction must be favourable. An agreement must be supported and upheld, if possible. *Verba debent intelligi cum effectu ut res magis valeat quam pereat*. If two constructions are to be placed upon a matter, that must be preferred which upholds the validity of the agreement (*Steele v. Hoe* (1849)).

Construction in favour of validity of contract preferred

(5) Words must be construed in their ordinary sense. Generally speaking, the popular meaning of words is that which ought to be adopted. Thus, the primary meaning of the "month" in legal documents is "lunar month," and unless it is so provided by statute, as it is in such statutes as the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893, the meaning "calendar month" is not applicable even in commercial documents. "Month" can bear that meaning only in cases where a secondary meaning can be admitted (*Bruner v. Moore* (1904)). If words have acquired a peculiar

Words construed in ordinary sense

signification from their use in a certain locality or trade, the courts will recognise and give effect to their meaning (**Hart v. Standard Marine Insurance** (1889)). Thus, in one case it was shown that a thousand rabbits always signified twelve hundred according to local usage (**Smith v. Wilson** (1832)). Also, where a lady was engaged as an actress for three years, it was given in evidence that the word "year" applied only to the theatrical season of the year (**Grant v. Maddox** (1846)).

Whole
contract
must be
considered

(6) The whole of the contract must be considered. *Ex antecedentibus et consequentibus fit optima interpretatio*. It would be absurd to fix upon certain terms of a contract and ignore the remainder. The parties must be presumed to have themselves considered the whole effect of the contract into which they were entering, and a construction which left out certain of the terms would lead to an erroneous result. It would be superfluous to give illustrations of this rule, which is too obvious to need more than passing notice.

Construction
depends upon
lex loci
contractus

(7) The construction must depend upon the law of the place where the contract is made. (On this branch of the subject Chapter XXIV, page 457, *post*, must be consulted for fuller information.)

Words
construed
most
strongly
against the
grantor

(8) The words of a contract must be construed most strongly against the party whose words they are (**Steinman v. Angier Line** (1891)). *Verba cartarum fortius accipiuntur contra proferentem*. For example, if a person gives a guarantee, and the language used is of an ambiguous character, the ambiguity will be taken most strongly against himself (**Hargreave v. Smea** (1829)). And if a common carrier exhibits a notice at his usual place of business, and gives to an intending consignor a handbill which differs in its terms from the notice, the carrier will be bound by that notice which is the less favourable to himself (**Munn v. Baker** (1817)).

Oral Evidence to Explain or Vary Written Contract.

The rule already referred to as the exclusion of oral evidence to vary the terms of a contract which is evidenced by writing does not extend to the case of what is called "latent ambiguity," that is, a word or

Latent and
patent
ambiguities

phrase which on its face appears perfectly clear, but which can be shown to be applicable to different matters. But oral evidence can never be given to correct a "patent ambiguity."

Further, for the purpose of proving fraud, illegality, undue influence, or that the contract was not the one intended or that it is not what it purports to be on account of the non-performance of a condition precedent on which its validity depended, oral evidence may be admitted. Customs and collateral conditions may, if not inconsistent with the written contract, be introduced by oral evidence.

Fraud,
illegality,
etc

Customs

Of course, a written contract can always be rescinded by a subsequent oral contract; similarly its terms can be varied so as to constitute a new contract, and in such a case oral evidence must be admitted to show the terms of the subsequent contract. Evidence of a subsequent oral contract varying a written contract is not admissible where the law required the original to be in writing (*Morris v. Baron & Co.* (1918)).

Rescission
of written
contract
by oral
contract

Assignment. At common law the rights acquired under a contract could be enforced only by one of the original parties to the contract, in other words a *chose in action* was not assignable. This was not the rule in equity which permitted assignments of *choses in action* in any form—even verbally. Moreover, by sect. 25 (6) of the Judicature Act, 1873 (now re-enacted in the Law of Property Act, 1925, sect. 136 (1)), it also became possible to assign choses in action at law. Such assignments, however, must be: (1) in writing and signed by the assignor; and (2) absolute and not by way charge only; and (3) notice in writing of the assignment must be given to the debtor or trustee of the fund which is being assigned. It has been held since, and especially in **Brandts, Sons & Co. v. Dunlop Rubber Co.** (1905), that the Act has created a new form of assignment—a legal assignment, and the old equitable form still survives, so that it is quite possible that an assignment which fails to take effect as a legal assignment through failing to satisfy all the statutory requirements, may still

operate as an equitable assignment. Even if the debtor cannot read, the notice in respect of a legal assignment must be in writing (*Hockley v. Goldstein* (1921)).

Effect of
assignment

Although the benefit of a contract can be assigned in this manner, the assignee can acquire only the rights which were possessed by the assignor. Therefore, if a debtor has a counter-claim or a set-off against his creditor, and the creditor assigns his rights to a third person, the assignee will be able to enforce only so much of the claim as the original creditor could have done, and will be bound to allow the counter-claim or the set-off. This is called an assignment "subject to the equities." In the same way, if a creditor has only a defective title to anything which he purports to assign, the title of the assignee, after the assignment, is affected with the same defect. This is true both of equitable assignments and of assignments under the Judicature Act.

An illustration may perhaps make this clearer. A is entitled to receive £100 from B for carrying out certain work. B has a separate claim, or a counter-claim, against A for something totally distinct from A's claim to the extent of £50, or he has a right to make a deduction of £50 from the cost of the work and set off the same against the claim. It will be seen that in either case A is not entitled to receive more than £50, and if he assigns his rights under the contract to C, although the assignment is of £100, C cannot claim more than £50, the amount to which A himself would have been entitled, and if C attempts to enforce his rights by action against B, he will be compelled to allow the amount of the counter-claim or the set-off, as the case may be, just in the same manner as A would have been compelled to do.

Notice of
assignment

The debtor cannot afford to ignore a proper notice of assignment. If he pays the original creditor after he has received notice he will have to pay the assignee as well. Thus, in *Brice v. Bannister* (1878), a shipbuilder assigned the sum of £100 to the plaintiff, a part of the price to be paid by the defendant for the building of a ship. The defendant had due notice of the assignment,

but ignored it and paid over the whole price of the ship to the shipbuilder. In an action brought by Brice it was held that since there had been a valid assignment, the defendant, Bannister, was bound to pay the sum of £100 to the plaintiff. In the course of the judgment Bramwell, L.J., said: "It does seem to me a strange thing, and hard on a man, that he should enter into a contract with another, and then find that, because that other has entered into a contract with a third, he, the first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so: and anyone who enters into a contract with A must do so on the understanding that B may be the person with whom he will have to reckon."

An assignment may be made of moneys not yet due (*Brice v. Bannister, supra*), or of debts to a creditor, the surplus to be paid to the assignor (*Burlinson v. Hall* (1884)). As to the assignment of a mortgage debt, see *National Provincial Bank of England v. Harle* (1881), and *Tancred v. Delagoa Bay Co.* (1889), and as to the reservation of rights by the assignor, see *Hughes v. Pump House Hotel Co.* (1902). It appears that no assignment can be made of an unascertained amount (*Jones v. Humphreys* (1902)), or of a part of a debt (*Williams v. Atlantic Assurance Co.* (1932)). A contract of sale is assignable. Thus, in *Torkington v. Magee* (1902), the defendant contracted to sell his reversionary interest in property to X, who by deed assigned his interest under the contract to the plaintiff. Due notice in writing of the assignment was given to the defendant, but he refused to perform his contract. It was held that the assignment was valid under the Judicature Act, 1873, and that the plaintiff was entitled to sue for damages for the breach of the contract. This case of *Torkington v. Magee* was reversed by the Court of Appeal, but the reversal was upon a special point, which did not affect the law as stated above. See also **Brandts, Sons, & Co. v. Dunlop Rubber Co.** (1905), which states the rule as to the equitable assignment of debts. To constitute a good equitable

What may be assigned

Debts

Unascertained amount

Contract of sale

assignment it is only necessary that the debtor should be given to understand that the creditor has made over the debt to some third person. In such a case the debtor disregards the notice at his peril.

Not contracts
of a personal
nature

Contracts of a personal nature cannot, generally, be assigned. Where the exercise of a certain amount of skill, knowledge, or personal supervision has been one of the principal inducements towards the formation of the contract a party cannot assign the benefits to be derived from the contract to another person. A painter cannot give to a fellow painter the benefit of a contract to paint a picture on a particular subject any more than an agent can, in the ordinary course of things, delegate his authority (*Robson v. Drummond* (1831); *Boulton v. Jones* (1857); *Jaeger's Sanitary Woollen Co. v. Walker* (1897); *Tolhurst v. Associated Portland Cement Manufacturers, Ltd.* (1903); *Kemp v. Baerselman* (1906)). It was held also, in *Griffith v. Tower Publishing Co., Ltd.* (1897), that the principle established in *Stevens v. Benning* (1854), that a publishing agreement between an author and a publisher, or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company.

The rule as to the non-assignability of personal contracts was thus stated by Cockburn, C.J., in the case of **British Waggon Co. v. Lea** (1880): "We entirely concur in the principle on which the decision in *Robson v. Drummond* (1831) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualifications, the inability, or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an

end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party." In the case of **British Waggon Co. v. Lea**, however, *Robson v. Drummond* was distinguished, and it was held that the repair of waggons was not a service which it was important should be performed by the company contracting.

Where an assignment of a debt is made by two or more members of a partnership firm to different individuals, that person will be entitled to receive the amount thereof who has first given notice of the assignment made to him. In the case of *Marchant v. Morton, Down & Co.* (1901), it appeared that a debt due to a firm was assigned by one partner to the defendants in writing, and was subsequently assigned by the other partners to the plaintiff by deed. The plaintiff gave notice to the debtor before the defendants did so. It was held by Channell, J., that there had been a valid equitable assignment of the debt to the plaintiff, and that, as he had been the first to give notice of the assignment to the debtor, he was entitled to the debt in priority to the defendants.

Priority
between
assignees

Special provisions have been made for the assignment of rights arising out of particular *choses in action*, e.g. policies of insurance, shares in joint-stock companies, debentures, etc., either by Act of Parliament or by articles of association. The provisions must be strictly complied with in order that the assignment of any of these may be effectual. Assignability must not be confounded with negotiability. The latter is dealt with in Chapter XIII, page 257, *post*.

Assignment of
rights arising
out of
particular
choses in
action

The assignment of obligations arising out of a contract is not allowed, except with the consent of the party to whom the performance is due. There must be an agreement made between the two contracting parties that a third person shall stand in the place of either of them, and the third person must consent to be

Assignment of
obligations
arising out of
contract

Novation

substituted. This is called "novation," a term introduced from Roman law. In point of fact, when novation takes place a new contract is made in lieu of the old one, and fresh parties are substituted for those who were originally bound. There are exceptions to this rule, but they are mainly statutory. In the case of land there are certain obligations or liabilities which always "run with the land," that is, bind the person who is in possession for the time being. These latter, however, belong to the law of real property.

Effect of death or bankruptcy of party to contract

Irrespective of the acts of the parties, assignment of rights and obligations may take place through the death or the bankruptcy of one or both of them. In the case of death the personal representative, either executor or administrator, succeeds to the position of the deceased, acquires his rights, and is answerable for his liabilities to the extent of the estate that has been left. As has been stated before, an executor or administrator may render himself personally responsible to any extent if there is an agreement in writing to satisfy the fourth section of the Statute of Frauds. The chief exception to this rule is that which has reference to contracts for personal services, such as the employment of a servant or of an apprentice. Death puts an end to such a contract, since it is assumed to be an implied condition of the contract that no substitute shall be allowed to fill the place of the original promisor or promisee. If in any of these cases the transaction is continued by mutual consent, it is a new contract; if, for instance, a servant continues to serve in the family of his deceased master, or if a painter's executor, being also a painter, were to complete an unfinished portrait on the original terms at the sitter's request (*Farrow v. Wilson* (1869); *Robinson v. Davison* (1871)).

In the case of bankruptcy the trustee in bankruptcy acquires all the rights and is responsible, to the extent of the property realised, for all the liabilities of the debtor. What are the powers and the duties of the trustee in bankruptcy will be discussed in a later chapter of the present volume.

CHAPTER VIII

DISCHARGE OF CONTRACT

THE rights and liabilities of the parties to a contract having been determined, and the manner in which the bond is created having been shown, it is now necessary to see how the contractual relationship is terminated. This is called the discharge of a contract. When a contract is discharged, all the rights and liabilities arising out of it are extinguished. Other rights and liabilities may have arisen, but they are altogether independent of the original contract

A contract may be determined or discharged in one of the following ways—

I. Agreement. This may happen in any one of three ways—(1) by the substitution of a fresh agreement in place of the original one ; (2) by waiver ; or (3) by release. If the original contract was under seal, the release must be effected by means of a deed. If not under seal, the release may be made by oral agreement, whether such agreement is or is not evidenced by any document in writing. But when a deed is not made use of, there must be a sufficient consideration to support the new agreement. Where the agreement is executory, and is constituted by the mutual promises of the parties, the consent of each to the alteration or cancellation will be consideration enough.

Substitution
of new
contract,
waiver, or
release

For the cancellation of a bill of exchange no consideration is required (*Foster v. Dawber* (1851))

Prima facie, every contract is irrevocable except by mutual agreement, and it is the duty of the person who wishes to revoke it to show something in the terms of the contract itself or something in its nature from which it may be implied that it was not intended to be permanent (*Llanelly Railway & Dock Co. v. London & North Western Railway Co.* (1875)). A contract may be, and usually is, framed in such a manner that it contains the elements of its own discharge within itself.

Contract
itself
providing for
discharge in
specified
event

There may be provisions, express or implied, which provide for its determination in certain circumstances. These circumstances may consist in (a) the non-fulfilment of a condition precedent; (b) the occurrence of a condition subsequent, or (c) the exercise of an option to determine the contract which is reserved to one or both of the parties by its terms. A enters into a contract with B to purchase certain goods, and conditions are attached to the contract of sale which are not fulfilled. A is entitled to repudiate the contract (*Head v. Tattersall* (1871)). This is an illustration of the first circumstance. The second may be instanced by the case of an ordinary bond. A binds himself by deed to pay to B a sum of money, but if B performs a certain act the bond is to become void. The performance of the act extinguishes the contract. The third case of the exercise of an option is illustrated by the common contract of domestic service. A servant can terminate the contract entered into by a month's notice, and a master by a month's notice or the payment of wages (*Nowlan v. Ablett* (1835)).

II. Performance. By performance is meant the fulfilment of the terms of the contract in every respect.

If a time is fixed for the performance, it must be observed; if not, a reasonable time is to be allowed.

The same is true as to the mode of performance. The thing to be accomplished must be done in the manner prescribed, otherwise there is no performance. But where there are several ways in which a contract can be performed, and if there is no stipulation to the contrary, that method may be adopted which is the least burdensome to the defendant (*Cockburn v. Alexander* (1848)). Again, where the contract is in the alternative, the person bound to perform a certain act can elect which of the two he will choose to do; but when an election has been made, the party electing is bound thereby (*Brown v. Royal Insurance Society* (1859); *Gath v. Lees* (1865)). But if one of the alternatives is incapable of being performed, the promisor is bound to perform the other (*Stevens v. Webb* (1835)).

Time for
performance

Mode of
performance

If the performance of a contract consists in the payment of a sum of money, the mere readiness of the debtor to pay is not sufficient. In order to free himself from liability the debtor is bound to seek out his creditor, and to pay or to tender the sum to him (*Haldane v. Johnson* (1853)).

Payment

Debtor must seek out creditor

The money paid in order to make the discharge absolute must be by what is called legal tender, unless the creditor dispenses with it. Gold coin of the realm is legal tender to any amount, and so are Bank of England notes. But silver coins may be refused in payment beyond forty shillings, and bronze coins beyond twelve pence.

Legal tender

If a cheque, bill, or note is accepted by a creditor in payment of money due, it will depend upon the circumstances of the case whether it was the intention of the parties to extinguish the existing contract by the transfer of such cheque, etc. If it was, then the creditor has a new contract in place of the old one, upon which he must sue in the event of the cheque being dishonoured. Generally, however, it is understood that the cheque is given conditionally, and that the agreement between the parties is that if the cheque is dishonoured the original contract is revived (*Puckford v. Maxwell* (1794); *Crowe v. Clay* (1854); *Ex parte Matthew* (1884)).

Cheques, etc

If money is sent by post, and it is proved to the satisfaction of the court that the letter containing it was properly directed, the debtor is discharged even though the letter is lost, if he had instructions to send the money through the medium of the post, but not otherwise. A direction to transmit by post will not be inferred from a long series of transmissions of the same kind which have never been objected to. This was the decision of the Court of Appeal in *Pennington v. Crossley* (1897), where it was shown that a Bradford merchant had been paid by cheque for a long series of years for goods supplied to a manufacturer of Halifax. At last one cheque went astray. The letter containing it was not delivered, and the cheque got into the hands

Payment by post

of a stranger, who forged the endorsement and received payment of the same. See also *Mitchell-Henry v. Norwich Union Life Insurance Society, Limited* (1918), as to remittances made through the post. Circumstances, however, may lead to an inference that the creditor has directed that a cheque shall be sent through the post. Thus, in the case of *Norman v. Ricketts* (1886), it was held that a request by a tradesman in London to a customer in the country for a cheque within the course of the week was a sufficient direction to the customer to send it by post, and that the creditor must bear any loss arising through the non-delivery of the letter and the cheque.

Payment of
smaller sum
in place of
larger

The payment of a smaller sum of money will not release a debt of a larger amount. Thus, if A owes B £50, and B agrees to accept £30 in full payment, and the money is paid in legal tender, A is still indebted to B to the extent of £20, as there is no consideration on the part of B for forgoing the balance of the debt (*Cumber v. Wane* (1719)). It is perfectly true that the parties may have agreed as to the discharge of the contract, but that is not sufficient to put an end to the matter. In legal language it is not enough for there to be an "accord"—there must also be "satisfaction." The case of **Foakes v. Beer** (1884), is a further illustration of this proposition. A judgment was obtained by the plaintiff, and an agreement in writing was entered into between the plaintiff and the defendant by which the plaintiff undertook not to take any proceedings on the judgment in consideration that the defendant paid a part of the sum on the signing of the agreement, and the remainder by certain instalments. The defendant performed his part of the terms of the agreement, but it was held that the plaintiff was not bound by the terms, as there was no consideration for the relinquishment of his rights, and that he was entitled to issue execution for interest on the judgment debt. An eminent writer on the Law of Contract has said: "Some denunciation and some ridicule have been expended on the rule that the payment of a smaller

Accord and
satisfaction

sum in satisfaction of a larger is not a good discharge of a debt. And yet, as was said in a judgment in which the House of Lords affirmed the rule (that is, in the case of *Foakes v. Beer*, *supra*) it is not really unreasonable, or practically inconvenient, that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation.'"

If, however, the smaller amount is paid by a third person on the understanding that liability is thereby extinguished, the debt is extinguished (*Welby v. Drake* (1825); *Hirachand Punamchand v. Temple* (1911), in which cases a smaller sum than that owed was paid by a father on behalf of his son).

Payment by
or to a third
person

But the giving of something other than money operates as a full satisfaction, since there is no necessity, in law, that the consideration for an agreement should be adequate. Even a negotiable instrument is sufficient, so that a cheque for £1, if there has been an accord between the parties, is a legal satisfaction of a debt of £20 (*Sibree v. Tripp* (1846); *Goddard v. O'Brien* (1882)).

Negotiable
instrument
as accord and
satisfaction

If there is a dispute as to the amount due (*Cooper v. Parker* (1855)), or if payment is made at a date earlier than that stipulated for (*Pinnel's Case* (1602)), a smaller sum will liquidate a debt of a larger amount, and the payer will obtain a legal discharge. The doctrine as to accord and satisfaction does not apply to a claim for unliquidated damages, that is where the amount in dispute is not exactly fixed, and it has no application under the bankruptcy law, by which a debtor may be discharged from his various obligations when his creditors accept a composition.

Payment of
smaller sum
where
amount of
debt
disputed

If several parties are jointly liable upon a guarantee or other debt, an accord and satisfaction made by one of the parties will discharge the rest (*Nicholson v. Revill* (1836); *In re E. W. A.* (1901)).

Composition
with
creditors

Accord and
satisfaction by
party jointly
liable on
guarantee

It is no uncommon practice for a debtor to endeavour to reduce the amount of the claim made against him by sending a cheque for a smaller sum, and a form of receipt to be signed by the creditor "in satisfaction of all demands." Thus, in *Day v. McLea* (1889), the

Retention of
cheque for
smaller
amount not
conclusive of
accord and
satisfaction

plaintiff claimed a liquidated amount from the defendant. The latter sent a cheque for a less amount, and with it there was a form of receipt which contained these words, "in full of all demand." The plaintiff retained the cheque, and a receipt was sent by him on account. Afterwards the plaintiff sent for the balance. It was held that the retention of the cheque was not conclusive as to there being accord and satisfaction.

Tender

Tender operates as a performance of a contract, if made strictly in accordance with the terms of the contract, but refused by the promisee. It has the effect, unless it is a tender of money, of discharging the promisor from all liability under the contract. A tender of money, however, does not extinguish the debt, but the debtor should, if the money is not accepted, and an action is commenced against him, bring the amount into court and plead the tender. If the creditor then proceeds with his action, and recovers no more than the amount tendered, he will have to pay the defendant's costs of the action. To constitute a good tender, the full amount must be actually produced, unless the creditor dispenses with the production (*Douglas v. Patrick* (1790)), and offered unconditionally (*Laing v. Meader* (1824); *Scott v. Uxbridge & Rickmansworth Rly. Co.* (1866); *Greenwood v. Sutcliffe* (1892)). No change can be demanded. A tender in country bank notes or by cheque is good if the only objection made by the creditor is that the amount is insufficient. In such a case it is presumed that the actual production of the money which would constitute a legal tender has been dispensed with (*Polglass v. Oliver* (1831)). A legal tender should be made by the debtor to the creditor, but either party may act through a duly authorised agent.

Plan of tender

Appropriation of payments

In connection with the subject of payment should be noticed the rules respecting "appropriation of payments." If a debtor owes more than one debt to his creditor, and pays to him a sum of money which is insufficient to liquidate the whole of the debts, it may be of importance, in view of the Statutes of Limitations, to know to which debt the payment is to be

appropriated. The leading authority on the point is *Clayton's Case* (1816), from which the following rules, mainly taken from the Roman Law, are derived—

(1) A debtor making a payment has a right to appropriate it to the discharge of any debt due to his creditor.

Rules in
Clayton's case

(2) If at the time of payment there is no express or implied appropriation thereof by the debtor, then the creditor has a right to make the appropriation.

(3) In the absence of any appropriation by either debtor or creditor, an appropriation is made by presumption of law, according to the order of the items of account, the first item on the debit side being the item discharged or reduced by the first item on the credit side.

When two or more persons have jointly promised, each of them is liable on the contract, and the performance of the terms by any one of them is an extinguishment of the liability of the others. The contract is discharged by the performance. The one who has performed the contract can make his co-promisors repay their share of the debt or the liability. This right of contribution is confined to cases of contract; there is no contribution in tort, except in the case of a libel contained in various newspapers, and under sect. 37 of the Companies Act, 1929 (19 & 20 Geo. 5, c. 23).

Performance
by one of
several
jointly liable
on contract

When a debt is paid, the party paying has a right to a receipt, which, in the case of a debt amounting to £2 or upwards, must be stamped by the creditor with a two-penny stamp (Stamp Act, 1891, s. 103). Such a receipt is evidence of payment, though not conclusive evidence. If, however, the receipt is in the form of a deed, the party executing it is estopped from denying that he has received the money.

Receipts

With regard to money which becomes due from time to time (e.g. rent, or instalments under a hire-purchase agreement), the production of the receipt for the last payment is *prima facie* evidence that all money due up to the date of that receipt has been paid.

III. Breach. It may appear strange, at first sight, to assert that a contract is effectually discharged by a breach of it. A little consideration, however, will make

it clear that it is not meant that the defaulting party is entirely freed from his obligations, but that the rights and liabilities under the contract have been converted into a right of action for damages, or in certain cases for specific performance, or for an injunction.

Total breach

Right of
injured party
to repudiate
and claim
damages

The breach of a contract may be either total or partial. If it is total the party injured may repudiate the contract, claim damages for the breach, and may also claim on a *quantum meruit* (see page 106, *post*) for the value of any work which has been done under the terms of the agreement (*Planché v. Colburn* (1831)). It was argued in this case that the plaintiff could not succeed because he had not performed the whole of his work in connection with the matter in hand. The court, however, held that the abandonment of the work by the defendant put an end to the contract and effected a discharge. In the judgment it was said: "When a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*; part of the question here, therefore, was whether the contract did exist or not. It distinctly appeared that the work was finally abandoned, and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labours." See also *O'Neil v. Armstrong* (1895).

Action may be
brought before
time for
performance
due

Also when there is a total breach of contract, the party who is injured may at once commence an action against the other party, even though the time for performance is not yet due, provided that the circumstances are such as to make it clear that the terms of the contract will not be carried out. The case of *Hochster v. de la Tour* (1853) is an admirable illustration of this rule. The plaintiff had been engaged by the defendant to act as his courier at a fixed salary, the duties to commence on June 1st. Before that day arrived the defendant changed his mind, and told the plaintiff that he would not require his services. It was held that there was an immediate right of action, and that the plaintiff need not wait until 1st June to commence proceedings. If the repudiation is clear it is of

no consequence that the fulfilment of the contract is dependent upon other circumstances (*Short v. Stone* (1846); *Frost v. Knight* (1872)). But the renunciation must deal with the entire performance to which the contract binds the promisor (*Johnstone v. Milling* (1886); *Michael v. Hart & Co.* (1902)).

The right of action is the same if there is a renunciation during the performance of the contract. The leading case on this point of the subject is *Cort v. Ambergate Railway Company* (1851). The plaintiff agreed to supply the defendant company with a quantity of railway material at a fixed price. The deliveries were to be made by instalments on specified dates. After the company had received about one-half of the articles stipulated for, they intimated to the plaintiff that they would require no more. Cort brought his action at once, and it was held that he was entitled to succeed. He showed that he was able and willing to perform his part of the contract and that he was prevented from doing so by the action of the defendant company. An application was made by the defendants for a new trial on the ground that Cort ought to have proved an actual delivery of the material. The Court of Queen's Bench, however, held that where there had been a renunciation of the contract by one of the parties thereto it was not necessary for the other party to show anything more than a willingness to perform his part of the agreement.

Renunciation
during
performance
of contract

Willingness to
perform
where one
party
renounces
contract
sufficient

Where there is a partial breach of contract, it is a most difficult question to decide what are the rights of the injured party. And it appears almost impossible to discuss the subject in a manual which cannot profess to be exhaustive of the law upon any particular subject. The simplest way of testing the general question is to inquire whether the particular breach goes to the root of the contract. If the contract is divisible the non-performance of any particular portion of it will not entitle the parties to consider such a breach as a discharge (*Franklin v. Miller* (1836)). If, on the contrary, the particular breach so affects the whole contract that

Partial breach

Discharge a question depending on facts of case

it is clear that one of the parties to it does not intend to fulfil his general engagements, the contract is discharged (*Freeth v. Burr* (1874); *Mersey Steel & Iron Co. v. Naylor* (1884)). Each case must depend, to a large extent, upon its own particular facts.

Remedies for breach

Damages

The most common relief afforded to an injured party for the loss which he has sustained through a breach of contract is damages. Since the main object in awarding damages is to place the injured party as far as possible in his original position, the measure of damages in contract is the amount of the loss which has been sustained through the breach of contract. These can always be ascertained. The parties themselves may have fixed the amount of damages in case of a breach of the contract. But the court will carefully scrutinise such an agreement, and if it comes to the conclusion that the amount fixed is a penalty rather than liquidated damages, relief will be given against the party to be charged. (See page 58, *ante*.)

Penalty or liquidated damages

Hadley v. Baxendale

The rules as to the amount of damages recoverable are ascertainable from the well-known case of **Hadley v. Baxendale** (1854). That case laid down the general rule that the damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising naturally from the breach itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.

Damages for special losses

This rule was applied in *Cory v. Thames Ironworks Co.* (1868), where it was held that on the sale of a chattel, where it is intended by the buyer for a special purpose but the seller supposes it for a more obvious purpose, the damages which the buyer can recover for non-delivery are the amount of the loss of profit which he might have made had he used the articles for the purpose supposed by the seller. Thus it follows that while sometimes special losses are taken into consideration, and are recoverable from the defendant, this is only the case when the defendant knew that such

special loss would naturally arise from a breach of the contract, and undertook, expressly or impliedly, to be answerable for such loss (see **Hammond & Co. v. Bussey** (1887)). In *Horne v. Midland Railway Company* (1873) the court expressed the opinion that a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages, but to render them liable to special damages the notice must be given under such circumstances as to make it a term of the contract.

In addition to damages the court may award interest upon a debt or a fixed sum of money awarded to a successful plaintiff in an action. At common law this was not so. Mercantile usage brought about a change. In *Higgins v. Sargent* (1823), Abbott, C.J., said: "It is now established, as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances." Now, however, by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), sects. 28 and 29, it is enacted "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or
 † sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. Provided that interest shall be payable in all cases in which it is now payable by law. The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or

Interest upon
debt or upon
fixed sum
awarded in
action

trespass *de bonis asportatis*, and over and above all money recoverable in all actions on policies of insurance after the making of the Act." Interest runs on a judgment debt until the judgment is satisfied (Judgments Act, 1838 (1 & 2 Vict., c. 110), sect. 17). Special Acts of Parliament also provide for the payment of interest, e.g. the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), sect. 57.

Specific
performance
and injunctions

Both specific performance and injunction are remedies in the discretion of the court and are awarded only where damages are inadequate. Specific performance involves the carrying out of the contract as agreed under order of the court, while injunction is an order made by the court to compel a person to do or refrain from doing some act which has been the subject-matter of a contract. A contract involving personal service will never be enforced specifically, and in **Whitwood Chemical Company v. Hardman** (1891) the court refused to grant an injunction to restrain a servant, who had contracted "to give the whole of his time to the company's business," from helping a rival enterprise on the ground that to grant an injunction would in effect be a decree for specific performance of the contract.

The remedies of specific performance and injunction are seldom met with in mercantile law, the remedy of damages being generally considered adequate under the circumstances, but by sect. 52 of the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), specific performance is expressly authorised to be decreed in certain circumstances (see page 254, *post*).

Quantum
meruit

Under certain circumstances a party to a contract has a right to sue on an implied contract to pay for what has been done, i.e. on a *quantum meruit*. An action will lie on a *quantum meruit* only when the person who has partly performed is prevented from completing owing to the other party's default (*Cutter v. Powell* (1795)). The person claiming must be in a position to repudiate the contract through the other's default (*Hulle v. Heightman* (1802)). There must be a total

breach; it was held in *Planché v. Colburn* (1831), that "where a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*." The contract must therefore have been completely terminated. In *Mavor v. Pyne* (1825) there was an agreement to take a work published periodically, and after taking some the defendant refused to take more or to pay for those he had taken. The court held that he was liable on a *quantum meruit* for those he had taken, although, since the contract was not to be performed within a year, there should have been writing to support it, as there was an implied contract to pay for each number as delivered.

IV. Lapse of Time. By the provisions of three Acts of Parliament, the Statute of Limitations, 1623 (21 Jac. 1, c. 16), the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), and the Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57)—commonly known collectively as Statutes of Limitations—actions which arise out of contract must be brought within a certain period. The Statutes of Limitations (except the last, which refers exclusively to land, and therefore requires no further notice here) do not affect the contract itself, but discharge it by barring the remedy.

Statutes of
Limitation

In the case of a simple contract, an action must be commenced within six years of the time when the cause of action arose, while twenty years are allowed for a contract under seal. It should be observed that the Act of 1874 imposes a limitation of twelve years in the case of actions or suits for the recovery of money charged on land, and this period of limitation applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. So that actions on certain contracts coming within this Act must be commenced within twelve years of the time when the cause of action arose, and not within twenty years as in the case of an ordinary contract under seal (*Sutton v. Sutton* (1883); *Fearnside v. Flint* (1883)).

Periods of
limitations

The cause of action arises at the moment when the contract is broken. This must be carefully ascertained,

When cause
of action
arises

partnership, because payments made by either party are payments of the firm. As illustrating the modern law, reference may be made to *Watson v. Woodman* (1875).

Merger

V. Merger and Estoppel. A contract is discharged by merger and by estoppel. Merger is the substitution of a higher grade of contract for a lower. The latter is put an end to, and the former takes its place, swallowing up, as it were, its predecessor. Thus, a simple contract debt is of a lower grade than a specialty debt, and if the debt has reference to the same matter, the specialty merges the simple contract. Again, a judgment of a court of law, which is a contract of record, is superior to any right of action, and a judgment in favour of a plaintiff discharges his right of action and supersedes it.

Estoppel

Similarly, if a judgment is given in favour of a defendant, the judgment supersedes the right of action, and acts as an estoppel; that is, it debars the plaintiff from again suing the defendant for the same cause of action.

VI. Impossibility. It has already been pointed out (see page 70, *ante*) that the performance of a contract may be impossible at the time the contract is made, e.g. where the subject-matter of the contract has already ceased to exist. Such a contract is void. Impossibility may, however, arise subsequently to the making of the contract. In such a case performance is not necessarily excused. A party failing to perform a contract, though no blame may attach to him, is liable to pay damages.

Exceptions to rule

Continued existence of subject-matter

Personal contracts

To prevent the rule set out above from being too great a hardship, the courts have provided two exceptions. The first is where the performance depends upon the fact of the subject-matter continuing to exist and the second is where the contract is personal and becomes impossible of performance by the death, illness, or incapacity of one of the parties.

Taylor v. Caldwell

The leading case on the subject is *Taylor v. Caldwell* (1863), where a theatre was let to the plaintiff by the

defendant, and was accidentally destroyed by fire before the date of the performances proposed to be given by the plaintiff. It was held that as the parties must be presumed to have contracted on the basis of the continued existence of the premises, the defendant was not liable to pay anything towards the expenses which the plaintiff had incurred in making his preparations.

Taylor v. Caldwell was applied in *Howell v. Coupland* (1876), where there was a contract for the sale of potatoes of specific land, and the court held that the contract was subject to an implied condition that the parties should be excused if performance became impossible by the perishing of the crop without default of the contractor. In *Hayward Bros., Ltd. v. Daniel & Son* (1904), however, the rule in *Taylor v. Caldwell* was excluded where the contract was for the sale of a specific quantity of a particular kind of goods, and did not refer to things grown on the defendant's land.

An interesting case on impossibility of performance is that of *Nickoll & Knight v. Ashton, Edridge & Co.* (1901). By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of goods, to be shipped by a certain steamship at an Egyptian port during January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. Towards the end of 1899, the steamship was stranded through perils of the sea, without any fault on the part of the defendants, and was so much damaged as to render it impossible to arrive at the port of loading during January, 1900. The plaintiffs sued for failure on the part of the defendants to ship a cargo under the contract. It was held, however, that the contract was to be construed as subject to an implied condition, that if at the time of its performance the steamship should, without any default on the part of the defendants, have ceased to exist as a ship fit for the purpose of shipping a

cargo, then the contract should be treated as at an end.

Coronation
cases

Many cases on impossibility of performance arose out of the letting and hiring of seats for the Coronation in 1902, though it is not always easy to see the distinctions between some of them (*Herne Bay Steamboat Co. v. Hulton* (1903), and *Krell v. Henry* (1903)). In *Blakeley v. Muller & Co., Hobson v. Pattenden & Co.* (1903), it was decided that where money has been paid under a contract, the further performance of which has become impossible owing to the non-existence of the subject-matter of the contract, the contract is not rescinded *ab initio*, but both parties are excused from any further performance under the contract. This decision was approved in *Civil Service Co-operative Society v. General Steam Navigation Co.* (1903), and *Chandler v. Webster* (1904). In the course of his judgment in the last-named case Romer, L.J., used the following words: "Where there is an agreement which is based upon the assumption by both parties that a certain future event will take place, and that event forms the foundation of the contract between the parties, then if, without the default of either party and owing to circumstances which were not in their contemplation when the agreement was made, it happens that before the time fixed for the event it is ascertained that the event cannot take place, the parties are thenceforth both free from any subsequent obligation cast upon them by the agreement, but, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made and any legal rights previously accrued according to the terms of the agreement will not be disturbed."

Absolute
contract

Of course a man may contract absolutely as to a certain matter, and if he does so he cannot blame anyone but himself for the consequences. But the terms of the contract would need to be very explicit if the contract was one of a personal nature (*Boast v. Firth* (1868); *Robinson v. Davison* (1871)). It might be utterly impossible, in the circumstances, to secure the services of a deputy in cases of incapacity or illness.

The case of *Harvey, Ltd. v. Walker & Homfrays, Ltd.* (1931) provides an illustration of the application of the general rule that impossibility of performance arising subsequently to the making of the contract does not put an end to the liability of the parties. In that case, the defendants, lessees of an hotel, made an agreement with the plaintiffs, who were advertisers, for the erection and exhibition of illuminated advertisements for a term of years. The local authority, however, acquired the lessee's interest in the hotel by compulsion, and demolished the hotel. In an action by the advertisers, the court held that, as it could not be said that *both* parties had made their bargain on the basis that if the local authority took the hotel the contracts were to be discharged, the defendants were liable to damages for the breach.

The principle illustrated by *Baily v. De Crespigny* (1869), namely, that both parties to a contract are discharged from their obligations if the sovereign power makes performance impossible, was consolidated during the Great War by numerous decisions that contracts are unenforceable where a change in the law of the land makes performance legally impossible. Where performance would be a breach of the law, the parties are excused, even although performance was legal at the time the contract was made.

Frustration
of object

The case of *Shipton, Anderson & Co. v. Harrison, Bros. & Co.* (1915), shows how a party is excused from performance of a specific contract for the sale of goods when the goods are requisitioned by the Government. This case came before the Court in the form of a case stated by arbitrators for the opinion of the Court, under sect. 19 of the Arbitration Act, 1889; and the facts were briefly these: On the 2nd September, 1914, Messrs. Shipton, Anderson & Co., by a contract in writing, sold to Messrs. Harrison Bros. & Co., on the terms of the Rules of the Liverpool Corn Trade Association, "about 42,800 centals wheat *ex Dalecrest ex grain storage*; payment, cash within seven days after transfer order." The sellers were then the owners of wheat of that

quantity and description discharged from the *Dalecrest*, and lying at a warehouse in Liverpool. The wheat was then subject to a lien for freight and charges, and was not then standing in the names of the sellers in the books of the warehousemen. On the 4th September, 1914, the lien having been satisfied, the wheat was *transferred into the names of the sellers*, and they obtained a delivery order. On the same day the sellers were orally informed that the wheat was requisitioned by the Government. Four days later, the sellers received a written requisition requiring them to deliver the wheat to a Government agent, and the sellers at once informed the buyers. On the 11th September, 1914, the agent of the Government applied to the sellers for delivery of the wheat, and obtained from them a delivery order therefor. No delivery order or transfer order was at any time given by the sellers to the buyers under the contract of sale. When the whole matter came before the arbitrators and the question was raised as to the right of the buyers to damages for non-delivery of the wheat, the case, on the point of law raised in the arbitration, was referred to the High Court for decision as to when the property in the wheat passed to the buyers under the contract and whether the sellers were, under the circumstances, discharged from their liability to deliver the wheat. It was held by the High Court that delivery of the wheat by the sellers to the buyers having been rendered impossible by the lawful requisition of the Government, the sellers were excused from performance of the contract.

A still more interesting and exhaustive case is that of *Metropolitan Water Board v. Dick, Kerr & Co.* (1918), of which the facts were as follows: By a contract made in July, 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six years, subject to a proviso that if by reason, *inter alia*, of any difficulties, impediments, or obstructions, whatsoever and howsoever occasioned, the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of

the contract, it should be lawful for the engineer to grant an extension of the time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract, and they ceased work accordingly. The contractors claimed that the effect of the notice was to put an end to the contract. The House of Lords held that the provision for extending the time did not apply to the prohibition of the Ministry, that the interruption created by the prohibition was of such a character and duration as to make the contract, when resumed, a different contract from the contract when broken off, and that the contract had ceased to be operative.

In *Kursell v. Timber Operators and Contractors* (1927) the vendors agreed to sell the uncut timber then growing in a forest in Latvia. The purchasers took possession and began to cut the timber, but were almost immediately dispossessed by agents of the Latvian Government under an agrarian law passed subsequently to the making of the contract. It was held that the object of the contract being entirely frustrated and its performance rendered illegal, the parties were released from their obligations under it.

Every fortuitous circumstance may not be pleaded as a frustration of the contract; for instance, where a contract was for certain goods of a specified year's manufacture, the fact that no such goods were produced in the year in question is not an excuse, and impossibility cannot be pleaded (*Thornett & Fehr v. Ynalls, Ltd.* (1921)).

The discharge of personal contracts by the death of a contracting party was discussed at page 94, *ante*.

Death of
party to
contract

The manner in which contracts are affected by the bankruptcy of one of the parties to the contract will be noticed in the chapter dealing with Bankruptcy and Bankruptcy Practice.

Bankruptcy

PART II

COMMERCIAL RELATIONS BETWEEN PERSONS

CHAPTER IX

AGENCY

Definition of Agent. An agent is a person "who is employed to do anything in the place of another." The person who employs the agent is called the "principal."

*Qui facit per
alium facit
per se*

The rule of the common law is expressed in the maxim *qui facit per alium facit per se*, and by the common law one man has always the power to authorise another to act for him and to bind him by an authorised contract. This contractual power of an agent has been expressly recognised by various statutes, e.g. the Statute of Frauds, the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893, and the Law of Property Act, 1925. But even where there is no express authority given by a statute for the interposition of an agent in the formation of a contract the common law rule prevails in the absence of anything to the contrary. As Quain, J., said in *R. v. Kent Justices* (1873), where an agent had signed a notice instead of his principal, "We ought not to restrict the common law rule, *qui facit per alium facit per se*, unless the statute makes a personal signature indispensable." *In re Whitley Partners* (1886) provided a further example of the application of the common law rule. In that case it was held that the necessity under the Companies Act, 1862 (now sect. 1 of the Companies Act, 1929), of "subscribing their names" to the memorandum of association was satisfied if an agent, who was duly authorised to sign on behalf of his principal, so signed.

*Agency and
employment
distinguished*

Although the terms "agency" and "employment" are frequently confounded, the latter term is much

wider in its signification than the former. In mercantile law the word "agency" is used to signify the peculiar kind of employment necessary to bring the principal into legal relationship with third parties. The agent is the effective cause in the formation of the contractual bond, but when that bond has been established the agent disappears from the scene and the principal takes his place.

Any person who possesses the legal capacity to enter into a contract may appoint an agent to do any act in his place, unless the circumstances are such that the personal act of the principal is imperatively demanded. But a person who is unable to enter into a legal contract cannot rid himself of his disability by employing an agent. On the other hand, however, it is not necessary that an agent should be a person possessing legal capacity to contract on his own behalf. Thus, an infant may be appointed an agent, and a married woman or an alien, each of whom prior to recent legislation suffered under legal disabilities, is capable of occupying the position.

Contract of agency

Although there is no necessity in the creation of agency that any consideration should move from one party to the other, the agent is generally paid for his services by salary or commission.

No necessity for consideration

Classes of Agents. Agents are generally divided into three classes—special, general, and universal.

A special agent is one who is appointed for a particular purpose, and is therefore invested with limited powers. He has no authority to bind his principal in any other matter than that for which he is engaged, and the persons who deal with him are bound to ascertain the extent of his authority (*Sandeman v. Scurr* (1866)).

1. Special agents

A general agent is one who has authority to do anything which comes within the limits of the position in which he has been placed by his principal, and who binds the principal by his acts done whilst in that position. For example, if a general agent is placed in management of a house of business, he has an implied authority to bind his principal by doing anything which

2. General agents

falls within the ordinary scope of that business. It makes no difference, as far as third parties without notice are concerned, that the principal has privately limited the authority of the agent, and that the agent violates the orders given to him by his principal; the principal is bound by his agent's acts done within the scope of his apparent authority (*Smethurst v. Taylor* (1844); *Duke of Beaufort v. Taylor* (1845)).

3. Universal agent

A universal agent is one whose authority is unlimited. Such an agent has power to bind his principal by any act which he does, provided the same is legal and agreeable to the law of the land.

Examples

An illustration of the three classes of agents is seen in the case of a principal who carries on a number of different businesses. A universal agent binds the principal by any act done in connection with any of the different businesses carried on. A general agent can bind the principal only by acts done in the particular business in which he is engaged. A special agent has no authority to bind the principal by anything done outside the particular duties imposed upon him.

Mercantile Agents

Kinds of Agents. By the Factors Act, 1889 (52 & 53 Vict., c. 45), a mercantile agent is defined as one "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." But the definition does not exhaust the list of agents or the extent of their authority. The principal kinds of agents, some of whom are mercantile agents, are the following—

1 Auctioneers

Agent of seller

(1) **AUCTIONEERS.** These are agents appointed by the seller to sell goods, either privately or by public auction, for a reward, generally in the form of a commission. The auctioneer is primarily the agent of the seller, and his authority may be revoked at any time before a sale takes place, unless the rights of third parties have intervened. After the sale has taken place he is the agent of the purchaser for the purpose of signing the memorandum required by the Statute of

Frauds, the Sale of Goods Act, or the Law of Property Act, unless he is himself the vendor of the goods (*Farebrother v. Simmons* (1822)). But the signature of the auctioneer must be made at the time of the sale, and not several days later (*Bell v. Balls* (1897)). Under ordinary circumstances the clerk of the auctioneer may not sign as the purchaser's agent, though special circumstances may render this possible, and entitle the auctioneer to sue (*Bird v. Boulter* (1833), and *Bell v. Balls* (1897)). When no principal is disclosed the auctioneer is personally liable upon the contract and he may sue in his own name (*Williams v. Millington* (1788)).

Duties of
auctioneer

The duties of an auctioneer are (a) to obey the instructions of his principal; (b) to carry out his duties himself, and not to delegate them to any clerk, unless he has authority to do so, or unless there exists a special custom to that effect (*Coles v. Trecothick* (1804); *Bell v. Balls* (1897)); (c) to store and keep the goods entrusted to him with proper care; (d) to use his best efforts to obtain the highest prices possible for the goods or property sold; and (e) to receive the purchase money in cash for goods sold by him before they are allowed to pass into the hands of the purchaser, unless it is customary to accept a cheque, and there is no negligence on the part of the auctioneer in accepting one (*Farrer v. Lacy* (1885)). In the case of a sale of land the auctioneer has an authority to receive only the deposit, and not the whole of the purchase money (*Sykes v. Giles* (1839)).

An auctioneer has possession of the goods which are entrusted to him, a special property in them, and a lien on them as far as his charges are concerned.

An auctioneer may, in the course of his business, be personally liable for conversion, which has been defined as "an unauthorised act which deprives another of his property permanently or for an indefinite time." The liability depends upon whether the goods are dealt with for the purpose of passing the property in them, or whether there is simply a settling of the price, or the performance of some other act which makes the

Liabilities of
auctioneer

auctioneer a mere intermediary between the supposed owner and the purchaser (*Barker v. Furlong* (1891); *Consolidated Co. v. Curtis* (1892)). For the former the auctioneer is liable; for the latter, not. In the case of *Cochrane v. Rymill* (1879), it was said in the course of the judgment: "The defendant had possession of these goods; he advertised them for sale; he sold them and transferred the property in them, and therefore from beginning to end he had control over the property. . . . Such acts amount to conversion. But the auctioneer will not be held guilty of conversion, if he has not claimed to transfer the title nor purported to sell, but has simply re-delivered the chattels to the person to whom the man from whom he received them told him to deliver them." An auctioneer may render himself personally liable for breach of warranty of authority on the sale of goods (*McManus v. Fortescue* (1907)); but he is able, in certain cases, to shelter himself behind the Factors Act, 1889 (*Shenstone v. Hilton* (1894)).

Auctioneer's
licence

An annual licence is required by an auctioneer, the cost of which is £10. During the time that a sale by auction is being conducted, the full name and address of the auctioneer must be posted up in a public position in the sale room.

2 Bankers

Relationship
between
banker and
customer

(2) BANKERS. The relationship between a banker and his customer is really that of debtor and creditor; but by the custom of bankers there is added the obligation on the part of the banker of repaying the debt owing when called upon to do so by the draft or order of the customer. To this extent, therefore, a banker is the agent of his customer. There is also an authority given to the banker to pay bills accepted by the customer and made payable at his bank; but it would seem that the banker is not bound to do so (*Bank of England v. Vagliano* (1891)). The failure on the part of a banker to honour the drafts of a customer, so long as the former has funds of the latter in his hands, or the customer is allowed an overdraft, renders the banker liable to an action, at the suit of the customer, for breach of

contract or for tort. (See further the chapter on Bills of Exchange, page 256, *post.*)

(3) **BROKERS.** A broker, who is a mercantile agent within the meaning of the Factors Act, 1889, is an agent employed to buy or to sell goods or merchandise for other people. As defined by Story (*Agency*, sec. 28) he is described as "an agent employed to make bargains and contracts in matters of trade, commerce, or navigation between other parties for a compensation commonly called brokerage." A person who makes a contract of a merely personal character for another is not a broker (*Milford v. Hughes* (1847)).

3. Brokers

Broker defined

Unlike a factor, a broker is not entrusted with the possession of the goods or merchandise in which he deals, and cannot sue or act in his own name (*Baring v. Corrie* (1818); *Fairlie v. Fenton* (1870); *Cole v. North Western Bank* (1875)). As he has not possession he has no right of lien; but there is an exception in the case of an insurance broker, who can retain the policy of insurance for the general balance due to him.

Broker and factor distinguished

The usual mode of dealing is for the broker to make entries in a book of the terms of the contract entered into (which entries are signed by him) and then to send particulars of the contract to both parties. The document sent to the buyer is called the "bought note," and that sent to the seller is called the "sold note." If these documents agree the terms of the contract are defined (*Rucker v. Cammeyer* (1794)). If they differ materially they do not constitute a binding contract (*Grant v. Fletcher* (1826)), and reference may then be made to the signed entry in the broker's book, just as recourse may be had to it if there are no bought and sold notes in existence (*Sievwright v. Archibald* (1851)). The broker is, of course, the agent of both parties to sign the memorandum required by the Statute of Frauds, the Sale of Goods Act, 1893, or the Law of Property Act, 1925.

Bought and sold notes

A stockbroker is a member of the London Stock Exchange, or of the exchange of some provincial town,

Stockbrokers

and effects sales and purchases of stocks and shares by dealing with other members of the exchange of which he is a member. The principal who employs the stockbroker is bound by the usages and customs of the exchange, even though he is unacquainted with their nature or their existence (*Sutton v. Tatham* (1839)), and impliedly undertakes to indemnify the stockbroker against any liability incurred by him under the rules of the exchange (*Harker v. Edwards* (1887)). This does not, however, apply to customs that are unreasonable or clearly contrary to law. For example, by Stock Exchange usage, the provisions of the Banking Companies (Shares) Act, 1867 (30 & 31 Vict., c. 29) (commonly called Leeman's Act), invalidating the sale of shares in a joint-stock banking company, unless the numbers of the shares, as stated in the register of the company, are set forth in the contract of sale, have in the past been disregarded. This usage was not binding upon the principal (*Neilson v. James* (1882); *Perry v. Barnett* (1885)); although in *Seymour v. Bridge* (1884) it was held, apparently on the ground that the defendant well knew of the usage and had dealt largely upon that footing, that the stockbroker was entitled to recover in an action for losses sustained in dealings with certain bank shares. As far as the Stock Exchange is concerned the members by whom sales and purchases are carried out are deemed to be principals in the transaction, and they must carry on their business according to the rules and customs of the Exchange. Between the stockbroker and his principal all the ordinary rules of agency are applicable.

Insurance brokers

An insurance broker is an agent who is employed to effect policies of insurance, the name being generally applied to one who negotiates policies of marine insurance. His position is peculiar in that he is not solely agent, but also a principal to a certain extent. He is personally responsible to the underwriters for the premiums to be paid, and has a lien against the assured over the policy which he has effected for the premiums and for his own charges (*Fisher v. Smith* (1879)). But

when a loss occurs the assured themselves are the persons who sue the underwriters. The latter, however, have a right to set up in the action any counter-claim they may have against the broker, if they are aware of any usage to that effect, or if there is unreasonable delay in prosecuting a claim against them (*Scott v. Irving* (1830)).

(4) COMMISSION AGENTS. These are a somewhat indefinite class of agents, who buy and sell goods, or transact business generally for other persons, receiving for their labour and trouble a certain payment, generally calculated at so much per cent upon the amount of the transaction. Their right to the remuneration depends upon the special contract made between their principals and themselves. In certain dealings, especially with foreign principals, there is a presumption that the agent is personally liable upon the contracts into which he enters, as he has no implied authority to pledge his principal's credit, nor to make a contract between a home merchant and a foreign producer (*Ireland v. Livingston* (1872); *Robinson v. Mollett* (1875); *Miles v. Haslehurst* (1907)). But this presumption may be rebutted by evidence of the intention of the parties to contract (*Harper & Sons v. Keller, Bryant & Co.* (1915)).

4. Commission Agents.

(5) DEL CREDERE AGENTS. A *del credere* agent is one who undertakes to keep his principal indemnified against loss due to the failure of those with whom he contracts on his principal's behalf to carry out the terms of the contracts. In effect, a *del credere* agent guarantees the solvency of those whom he introduces to his principal. The undertaking, however, is not a guarantee to answer for the debt, default, or miscarriage of another within the meaning of sect. 4 of the Statute of Frauds (*Couturier v. Hastie* (1856); *Sutton v. Grey* (1894)). A similar relationship to that existing between the principal and a *del credere* agent may exist by virtue of a custom of a particular trade, which may

5. Del credere agents

provide an exception to the rule that an agent is not personally liable to his principal in respect of contracts made within the scope of his authority.

6. Factors

Definition of factor

(6) FACTORS. A factor is a person who is employed to buy, sell, or deal with goods or merchandise. At common law he was defined as "an agent to whom goods are consigned for the purpose of sale, and who has possession of the goods, and is authorised to sell them in his own name upon such terms as he thinks fit, and power to receive the price and give a good discharge to the purchaser." This limited authority of a factor was found to work great hardship and to impede the freedom of mercantile dealings. In consequence, various statutes, called "Factors Acts," were passed to increase the power of disposition of such an agent. All these Acts were repealed and consolidated with amendments by the Factors Act, 1889 (52 & 53 Vict., c. 45).

Factors Act

The Factors Act applies to mercantile agents who have, in the customary course of their business as such agents, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (Factors Act, 1889 sect. 1). It applies to a much wider class than factors proper. The most important provisions of the Act relating to agents are contained in sects. 2-6, and are briefly as follows—

Power of disposition of goods

Where a mercantile agent is in the possession of goods or of the documents of title to goods, *with the consent of the owner*, any sale, pledge, or other disposition of them, made by him or his clerk in the ordinary course of business, is as valid as if the owner of the goods had expressly authorised it.

Consent of owner

The determination of the consent of the owner, where an agent has once been in possession with that consent, does not make any difference, provided that the person taking under the disposition had no notice that the consent had been determined. The consent of the owner, moreover, is presumed in the absence of evidence to the contrary.

The person taking under the disposition must act in good faith and must not have notice that the person making the disposition has not authority to make it.

Necessity for bona fides

Where a mercantile agent has obtained possession of documents of title to goods by reason of having been in possession, with the consent of the owner, of the goods represented thereby, or other documents of title to the goods, his possession is deemed to be with the consent of the owner. A pledge of the documents of title to goods amounts to a pledge of the goods themselves.

Possession of documents of title by virtue of former possession of goods

Pledge of documents

Where a mercantile agent pledges goods as security for a debt due from the pledgor to the pledgee, before the time of the pledge, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Pledge for antecedent debt

The expression "document of title" includes "any bill of lading, dock warrant, warehouse-keeper's certificate, and warranty or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer, or receive goods thereby represented" (Factors Act, 1889, sect. 1).

"Document of title" defined

The question of consent in relation to fraud was considered by the courts in two important cases reported in 1923, *Folkes v. King* and *Heap v. Motorists' Advisory Agency, Ltd.* In the former it was held that the agent who disposed of the goods had possession of them with the consent of the owner, while in the latter case it was held that the owner never gave his consent. In *Folkes v. King* a mercantile agent had authority to sell a certain article at a specified price, and from the beginning he intended to get the best price he could and to use the proceeds for his own purposes. This he did, and the court held that as the seller had consented to his having possession, a purchaser from him acquired a good title and the question of fraud was immaterial.

Construction of Factors Act

In *Heap v. Motorists' Advisory Agency, Ltd.*, the article was to be sold to a non-existent purchaser, and

on this ground it was distinguished from the earlier case. The court held that it was never intended that the agent should pass the property to anyone; if the seller had known that the purchaser did not exist, the car would not have gone out of his possession.

General
of

A factor has now authority to sell goods in his own name, to give warranties, to receive payments and give receipts, to give credit, to insure goods, and to pledge them. But in pledging goods he must not act contrary to his express instructions with the knowledge of the pledgee. In buying goods, if the commission stipulated for is not paid, a factor has a lien on the goods for his commission.

7. Ship-
brokers

Duties of
shipbrokers

(7) SHIPBROKERS. A shipbroker is an agent, generally located in a seaport town, who is appointed by shipowners to carry out and perform all the necessary transactions connected with the business of their vessels whilst they are in harbour, such as entering and clearing the vessels, collecting freights, chartering new freights, etc. Payment of commission is dependent upon the nature of the contract entered into between the parties. In the case of chartering, the commission is generally due upon the signing of the charter-party.

8. Ship-
masters

Duties of
shipmasters

(8) SHIPMASTERS. A shipmaster has all the authority of the *magister navis* of the Roman Law. He is empowered to do everything on behalf of the shipowner in order to bring the voyage to a safe and satisfactory termination. He can sell or mortgage the ship, pledge the shipowner's credit to raise money for the voyage, and even jettison the cargo (*Kleinwort v. Cassa Maritima of Genoa* (1877); *The Pontida* (1884)).

9. Solicitors

Authority of
solicitor

(9) SOLICITORS. A solicitor, acting under a general retainer, has an implied authority to accept service of process for his client, and to do all matters in connection with an action when it has commenced; but he must not commence an action himself on behalf of his client unless such authority can be reasonably inferred from

the retainer. Unless expressly prohibited from doing so he has authority to compromise an action already commenced. He is the agent of his client to receive money in an action (*Lydney & Wigpool Iron Ore Co. v. Bird* (1886)), and under sect. 115 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), he can receive purchase money in a fiduciary capacity (*In re Bell* (1886)). It may be mentioned here that the ordinary doctrines of agency do not apply to the acts of a barrister (see *Neale v. Gordon Lennox* (1902)).

(10) OTHER KINDS OF AGENTS. The implied agency of a wife has been already noticed. The agency of partners will be considered in the next chapter. It may be observed that a father is not liable for the debts of his children unless incurred with his authority. There is no agency implied as there is between husband and wife. Counsel signing a defence in an action on behalf of the defendant has been held to be an agent for the purpose of the signature to a note or memorandum to satisfy the Statute of Frauds (*Grindell v. Bass* (1920)).

10. Other
kinds of
agents

Creation of Agency. There is no particular form required for the appointment of an agent, though in order to make the agency binding upon the principal and the agent the ordinary rules of contract are applicable. The majority of agencies are created orally, and very often without any express arrangements at all. But writing is advisable except in the simplest cases. Care must be taken, however, to include in the document all the terms of the agency on the ground that parol evidence cannot be given to vary a contract evidenced by writing. If, however, a new contract is entered into which need not be evidenced by writing, and one of the terms of the new contract impliedly or expressly cancels one of the terms of the old contract, evidence of the new agreement may be given (*Williams v. Moss Empires, Ltd.* (1915)).

Form of
appointment

An agent to grant or to surrender certain leases, or to dispose of an equitable interest or trust subsisting

When
writing
necessary

at the time of the disposition, must be duly authorised by writing (Law of Property Act, 1925 (15 Geo. 5, c. 20), sect. 53). But no writing is necessary to enable an agent to sign the note or memorandum required by sect. 4 of the Statute of Frauds, sect. 4 of the Sale of Goods Act, 1893, or sect. 40 of the Law of Property Act, 1925 (*Heard v. Pilley* (1869)). Writing is sometimes imperatively demanded by statute, e.g. the Companies Act, 1929, sect. 34, requires that a prospectus shall be signed by every director named therein, or by his agent "authorised in writing"; similarly, sect. 140 of the same Act provides for the consent to act as a director, etc., to be signed by the proposed director or his agent duly authorised in writing.

Power of
attorney

An agent to contract under seal must be appointed by deed which is called a "power of attorney," otherwise he has no authority. A power of attorney may be expressed to be irrevocable, and if given for valuable consideration may not be revoked at any time in favour of a purchaser. In the same way, a power may be irrevocable for a fixed time, and in such a case valuable consideration is not necessary (Law of Property Act, 1925, sects. 126, 127). But if a principal allows an agent in his presence to enter into a contract on his behalf, the fact that there has been no appointment under seal will not avail as a defence (*Ball v. Dunsterville* (1791)). A deed is generally necessary, or advisable, when the intended principal is a corporation.

Implied
agency or
agency by
estoppel

In many cases the agency will be implied, even though no authority has in fact been given, from the conduct or the situation of the parties. The most familiar instances are those of a servant, a wife, or a partner. If a master has permitted his servant, by a long course of conduct, to pledge his credit, he is responsible for the acts of his servant done within the ordinary scope of his duties. And the master may be liable for acts done in excess of the ordinary duties if it can be shown that he has acquiesced in similar acts on former occasions. Similarly, a wife enjoys a more or less extended agency according to circumstances. As to partners, see

the next chapter. Implied agencies, however, are always of a limited character. They are sometimes known as "agencies by estoppel," because the party bound by the contract is estopped or prevented by law or by his conduct from denying the existence of the agency.

At times a person will become the agent of another by incurring expenditure on his goods in order to preserve them. In such a case there is an agency of necessity. Until recently agency of necessity was treated as limited to certain classes of agents, e.g. masters of ships, and there was considerable doubt whether the doctrine could be extended. In *Prager v. Blatspiel, Stamp & Heacock, Ltd.* (1924), however, it was decided that the principles were not restricted to certain classes of agency but that to establish an agency of necessity the agent must prove that there was an actual and definite commercial necessity for the sale, and that the transaction was *bona fide* in the interest of the principal. The wisdom of the extension of the principle in this case was doubted by Scrutton, L.J., in *Jebara v. Ottoman Bank* (1927), but the decision in that case did not turn upon the point.

Agency of necessity

Ratification. When an agent has exceeded his authority in such a manner that his principal could not be bound by the contract which has been made, the principal may afterwards adopt the transaction, provided the agent has contracted as agent and not as principal. This adoption of the contract as made is called "ratification." The principal will then be in the same position as he would have been in the absence of any irregularity, and will be entitled to the benefit of the contract, or liable for any losses which may arise out of it, as though he had previously authorised the making of it. The ratification must be of the whole and not merely of a part of the contract (*Hovil v. Pack* (1806); *Fergusson v. Carrington* (1829)), and it dates back to the time when the contract was entered into (*Bolton Partners v. Lambert* (1889)). Very slight evidence of ratification is necessary to bind the principal.

Contracts by agent in excess of authority

Principal must
exist when
contract
made

The contract must be made on behalf of a principal who is in existence at the time it is made. Thus "a company cannot ratify a contract made in its behalf before it came into existence—cannot ratify a nullity" (*Kelner v. Baxter* (1866); *In re Northumberland Avenue Hotel Co.* (1886); *Natal Land Co. v. Pauline Colliery Syndicate* (1904)). The principal must also be fully acquainted with all the facts of the case at the time of ratification (*Marsh v. Joseph* (1897)).

Agent
contracting as
principal but
intending to
contract as
agent

If an agent contracts in his own name without disclosing that he acts as agent and without authority so to act, but with the intention in his own mind of making the contract on behalf of another person, that other person cannot ratify the contract. This proposition is clearly established in the case of *Keighley, Maxsted & Co. v. Durant* (1901).

Agent
contracting as
for named
principal but
intending to
take benefit
himself

Again, where an agent makes a contract purporting to sell goods in the name of his principal, but with the fraudulent intention of selling them on his own account and for his own benefit, the principal may ratify and take the benefit of the contract as against the buyers (*In re Tiedemann & Ledermann Frères* (1899)).

Voidable act
may be
ratified, not
illegal act

A voidable act may be ratified by some subsequent act, but this cannot be done if the act itself was originally illegal and void. For example, a husband cannot ratify the forgery of a cheque committed by his wife (*Greenwood v. Martins Bank* (1932)).

Duties of Agent to Principal. The agent must carry out the work which he has undertaken to do, according to the terms which have been imposed by the agreement, either oral or written.

Skill and
diligence

He must use ordinary skill and diligence in doing his work. The amount of skill and diligence will depend upon whether the agency is a paid or a gratuitous one, and the exercise of the necessary amount of skill and diligence is a question of fact depending upon the circumstances of each particular case. No one is compelled to take up an agency gratuitously, and if a person promises, without consideration, to do a certain act, he is not liable to be sued because he fails to do it. But if

he enters upon the work his responsibility commences at once, and he must carry out the whole without being guilty of gross negligence. If he is to be paid for his work his liability is greater, as a paid agent is responsible for what is called ordinary negligence. If the agent is a person who is, or ought to be, endowed with special skill, for his profession, business, etc., he must exercise that special skill on behalf of his principal. Any losses which fall upon the principal through the negligence or lack of skill on the part of the agent must be made good by the latter. For example, if an insurance broker fails to effect a proper insurance, he must recoup his principal for any losses which arise through his failure. Similarly, if an agent gives credit without having any authority to do so, and the principal loses the price of his goods, etc., through the default of the purchaser, the amount of the loss must be paid by the agent.

Gross
negligenceOrdinary
negligence

Special skill

In *Weld-Blundell v. Stephens* (1920), the defendant, a chartered accountant, was employed by the plaintiff to investigate the affairs of a company in which he was interested. In a letter of instructions to the defendant, the plaintiff libelled certain officials of the company. The defendant handed the letter to his partner, who negligently left it at the company's office. Its contents were communicated to the persons defamed, who obtained judgment against the plaintiff. The plaintiff then sought to recover from the defendant the amount paid by way of damages. The court held that the plaintiff was entitled to nominal damages as a result of the defendant's negligence, but that the liability of the plaintiff in the libel action did not result from the defendant's breach of duty.

Although a principal chooses his own agent, and must use ordinary foresight in his selection, and is liable to third parties for the acts or defaults of his agent, he has a remedy over against the agent if the agent has represented to him that he possesses qualifications for the work or business upon which he has been engaged, which he knows that he has no right to claim, or has undertaken work for which he knows that he is unfitted.

Knowledge of
agent is
knowledge of
principal

As the knowledge of the agent is the knowledge of the principal, an agent should acquaint his principal immediately with all matters which come to his notice in connection with the business in hand.

Accounts,
remuneration,
etc.

Proper accounts must be kept of all transactions, and rendered to the principal on demand (*White v. Lincoln* (1803)). All moneys received must be handed over, and no deductions must be made except for remuneration and, if agreed, necessary expenses.

Fiduciary
position

As an agent and a principal stand in a fiduciary capacity towards each other, anything in the shape of using his position as agent for his own benefit cannot be permitted. For example, an agent who is employed to sell property cannot sell to himself, nor can one appointed to buy property buy that which belongs to himself, except with the knowledge and consent of the principal (*Robinson v. Mollett* (1875)). If such a thing happens, the seller or purchaser, as the case may be, is entitled to repudiate the sale or purchase.

Remedies of
principal
against agent

The agent must hand over to the principal all profits made, directly or indirectly, in the course of the agency. The moneys received by way of profit can be recovered by the principal as money had and received to his use. Alternatively, the principal may adopt the agreement made by the agent, and recover from the other party thereto any money which that party is liable to pay to the agent under the agreement (*Whalcy Bridge Co. v. Green* (1879)). This right of the principal, however, is confined to those cases where the transaction is legal (*Kimber v. Barber* (1872); *Morison v. Thompson* (1874)). But an undisclosed principal cannot sue for breach of contract entered into between the agent and third parties where there is no consideration moving from the principal but only from the agent (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co., Ltd.* (1915)).

It may be observed that a third party has no right of set-off against an undisclosed principal in respect of a debt due to the third party from an agent (*Cooke v. Eschelby* (1887)).

If the agent receives any secret commission, this may

be recovered by the principal, for it is an offence justifying dismissal (*Boston Deep Sea Fishing Co. v. Ansell* (1888)). And not only will an agent be compelled to pay over to his principal any secret profit or commission but his action disentitles him to receive any commission from his principal (*Andrews v. Ramsey & Co.* (1903)). Where, however, an agent made a secret profit in a matter incidental to the main purpose of his employment, the court held that he was not liable to forfeit his remuneration (*Hippisley v. Knee Brothers* (1905)). The rule as to secret profits, moreover, was held applicable in spite of the fact that no pecuniary interest of the employer was involved (*A.-G. v. Goddard* (1929)).

Secret
commissions
and bribes

The giving or accepting of secret commissions is in certain circumstances an offence punishable under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34). By sect. 1 of that Act it is an offence for an agent to accept, obtain, agree to accept or attempt to obtain, or for any person to give or agree to give or offer, any gift or consideration as an inducement or reward for the agents' doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs. It is similarly an offence to give or agree to give or to offer any gift or consideration to any agent as an inducement or reward. The offence is punishable with fine or imprisonment, or both.

Prevention of
Corruption
Act

If a principal has recovered from his agent the amount of a bribe paid to the agent for inducing his principal to enter into a contract with a third party, which turns out to be disadvantageous, this does not prevent the principal from recovering damages from the third party for any loss arising out of the contract. And no deduction is made from what the principal is entitled to receive on the ground that the money taken as a bribe has been paid over to him. This was decided in the case of *Mayor of Salford v. Lever* (1891). In *Shipway v. Broadwood* (1899) it was held that where a contract has been entered into by a principal through an agent who has been bribed, the principal is entitled to repudiate the contract although the taking of

the bribe has had no effect at all upon the agent's mind.

Commission
from two
parties

It has often been questioned whether an agent can, in any circumstances, take a commission from both sides, from his own principal and from the third party. There is no doubt that the practice is very common, and it appears that there is nothing illegal in it if the principal approves or has distinct notice of the fact (*Bartram v. Lloyd* (1903)). In *Fullwood v. Hurley* (1928), however, the court held that where an hotel broker was acting as the vendor's agent for reward he was not entitled to enter into a second agency of a like kind on behalf of the purchaser unless the arrangement was assented to with full knowledge by the original principal.

In *Harrods Ltd. v. Lemon* (1931), the estate agency department of Harrods had acted for the vendor of property and found a purchaser willing to buy if he received a satisfactory surveyor's report. The purchaser employed the surveying department of the same firm to report on the property. Immediately Harrods discovered that they were acting for both parties they suggested an independent surveyor, but the vendor nevertheless completed the sale. The court held that on the facts, though Harrods were guilty of a breach of duty, they could recover their commission because the vendor had full knowledge of the breach of their duty when he completed.

*Delegatus non
potest delegare*

The agent must himself do the work which he has contracted to carry out—he cannot delegate his authority to another person. *Delegatus non potest delegare*. This applies especially where the personal skill of the agent is essential, or where there is a trust, confidence, or discretion reposed in the agent. But there are exceptions to this rule. The principal may expressly or impliedly assent to the delegation, or the usage of trade may sanction it, or the nature of the business may require delegation for its proper performance, or a sudden emergency may render it imperative (per Thesiger, L.J., in *De Bussche v. Alt* (1878)).

Where an agent has been entrusted with money or goods to be applied on account of his principal, he cannot dispute his principal's title to the money or goods unless he proves a better title in a third person, and that he is defending on behalf and with the authority of that third person (*Bhawani Singh v. Maulvi Misbah ud-din* (1929)).

Title of principal

As a further result of the confidence which must exist between a principal and his agent, the latter must not make use of any information which he has received or of any knowledge which he has gained whilst in the employment of his principal to the disadvantage of the principal (*Lamb v. Evans* (1893); *Robb v. Green* (1895); *Louis v. Smellie* (1896)).

Use of information acquired as agent

Duties of Principal to Agent. The duty of the principal is to pay the agreed remuneration or commission, and, in most cases, all necessary expenses incurred in the transaction of the business. The condition precedent is that the agent has done the work which entitles him to receive the commission. To ascertain this it is necessary that the contract of agency should be as clear as possible. Many cases have been before the courts upon the question of the right to commission. The result of them appears to be that if the agent has been the effective cause in bringing parties together and has done all that is necessary to lay the foundation for the formation of a contract, the principal cannot deprive the agent of his commission simply on the ground that no contract is, in fact, entered into. Such a conclusion would subject every agent to the varying caprices of the principal, and render it almost impossible for him to earn his commission at all (*Prickett v. Badger* (1856); *Green v. Lucas* (1875); *Fisher v. Drewett* (1878)).

Remuneration

Several cases have come before the courts on the question of sole agency. It may be laid down as a general rule that the appointment of an agent as sole agent for the sale of certain property does not prevent the principal from himself selling the property, and the agent cannot recover damages from the principal who

Sole agency

so sells it (*Bentall v. Vicary* (1931)). Where the words used in the appointment of the agent were "to be left solely in your hands for sale," the court held that sale by the principal amounted to breach of contract, as the principal had agreed that the agent should have the sole right to dispose of it (*Chamberlain v. Rose* (1924)). It should be noticed that sometimes the words "sole agents" or "sole selling agents" amount to the grant of a monopoly, and sale by the principal in these circumstances will be a breach of contract (*Lamb & Sons v. Goring Brick Co., Ltd.* (1932)).

In all these cases, it may be observed, the remedy of the agent is damages for breach of contract, and not commission. He is not entitled to commission, because he has not earned it.

Indemnification
of agent

The principal must indemnify the agent against the consequences of all lawful acts done in pursuance of the authority conferred, and likewise for wrongful acts done against a third party, where the agent has acted *bona fide*, and was not aware of the wrongful nature of the act.

Secret
limitations
on agent's
powers

Relation of Principal and Agent to Third Parties. The employment of an agent has for its purpose the bringing together of the principal and third parties so as to form a contract. An agent may bind his principal by any act within the scope of his authority. The principal cannot impose secret limitations on the power of his agent, however, and limitations of the agent's authority should be communicated to the other party (*Watteau v. Fenwick* (1893)). Thus in **Howard v. Sheward** (1866), where Sheward employed his brother to sell a horse, but instructed him not to warrant it, it was held that Sheward was, nevertheless, liable for damages for breach of warranty on account of his brother giving a false warranty.

The rule may be expressed by saying that a person dealing with an agent is entitled to assume that his ostensible authority is his real authority.

In a general way, therefore, it would appear that the agent is not to be held liable upon any contract entered

into, provided there is really a principal in existence. But this stringent construction of the law would give rise to great difficulties, and three cardinal rules have been laid down relating to transactions with an agent who acts with authority to bind his principal. These rules are—

General rule

1. If a contract is made with an agent who is known to be such, and who names his principal at the time the contract is made, there is, *prima facie*, no contract with the agent at all. The principal is the proper person to sue or to be sued. But, of course, the agent may, if he chooses, make himself personally liable as a contracting party, and the third party may likewise give credit exclusively to the agent. In such a case there is no remedy over against the principal.

1 Agent contracting for named principal

To this first rule, however, there are two important exceptions —

Exceptions

(a) In a contract under seal made by an agent, even though the fact of the agency is stated in the deed, owing to a technical rule of law it is the agent and not the principal who is the party to sue or to be sued upon it (*Southampton v. Brown* (1827); *In re International Contract Company* (1871)).

(a) Contract under seal

(b) If an agent is a party to a bill of exchange in his own name, the principal is not liable upon the instrument. But "where a party signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of his principal, or in a representative capacity, he is not personally liable thereon" (Bills of Exchange Act, 1882, sect. 26).

(b) Agent party to bill of exchange

■ It was formerly thought that, where a merchant resident abroad purchased goods in England, through an agent resident in this country, the seller, in the absence of circumstances establishing privity between the foreign and the English principals, contracts with the agent, and that there is no contract with the principal (*Smyth v. Anderson* (1849); *Hutton v. Bulloch* (1874); *Flinn v. Hoyle* (1894)). This statement of the law, however, was considerably shaken by the decision in *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.* (1917). In that case, Bray, J., said: "In my opinion the true view

Principal abroad

is, whether the foreign principal is a buyer or a seller, that the facts that the principal is a foreigner and that the agent has not disclosed his name are . . . circumstances to be considered, and when the facts are doubtful, or in the case of a verbal contract, in dispute, or when there is a written contract the terms of which are ambiguous, they are of some importance; but where there is a written contract the terms of which are unambiguous, they are of no importance, and it is not true to say that there is a presumption of fact or law that the agent for the foreign principal is personally liable."

The rule then is that there may be a custom that the agent in such a case is liable to the exclusion of the principal, but if there is it is founded on the presumption that the agent has no power to pledge the credit of his foreign principal, and such a custom must not be inconsistent with the terms of the contract.

2. Agent contracting for unnamed principal

2. If a contract is made with an agent who is known to be such, but who does not name his principal at the time the contract is made, the agent is not liable on the contract as long as it is clear that he did not pledge his personal credit. Evidence of custom may, however, be given to show that the agent is the proper person to be charged (*Fleet v. Murton* (1871); *Hutchinson v. Fatham* (1873); but see *Benton v. Campbell Parker & Co.* (1925)).

3. Agent contracting without disclosing existence of principal

3. If a contract is made with a person who, though really an agent, is not known to be such at the time of entering into the contract, the undisclosed principal as well as the agent with whom the contract was made is, as a rule, bound by the contract and entitled to enforce it. But the third party must make his election within a reasonable time of discovering who the real principal is, and there must not have been any dealing with the agent of such a character as to prejudice the principal in his relations with the agent, and to lead him to believe that the agent alone is to be held liable (*Armstrong v. Stokes* (1872); *Watteau v. Fenwick* (1893); *Greer v. Downs* (1927)). Moreover, this doctrine that the principal can enforce a contract where his agent

makes it without disclosing that he is an agent, does not apply where the agent expressly describes himself as principal (*Humble & Hunter* (1848); *Dunlop Pneumatic Tyre Co. v. Selfridge & Co., Ltd.* (1915)).

The liability of a principal is not a joint liability with his agent, but an alternative liability. As shown above, there are instances in which a creditor may proceed against the principal or against the agent. But he must select which of the two he wishes or intends to hold liable—he cannot proceed against one and then against the other (*Scarf v. Jardine* (1882)). Therefore, if the creditor obtains a judgment against either the principal or the agent, he cannot afterwards succeed against the agent or the principal (*Kendall v. Hamilton* (1879)).

Misrepresentation by Agent. It has already been pointed out that the unauthorised acts of an agent can, in certain circumstances, be ratified by the principal. If the acts are not ratified, and the agent has contracted as agent, though he cannot be held liable as a principal, since he has not contracted as such, he is liable to an action for damages for breach of an implied warranty of authority (*Lewis v. Nicholson* (1852)); and if he has fraudulently misrepresented his authority he can be sued for the fraud (*Polhill v. Walter* (1832)).

Breach of
warranty of
authority

Action for
fraud

In the case of *Collen v. Wright* (1857), the defendant, a land agent, made an agreement with the plaintiff for a lease of a farm, professing to have authority to do so for his principal. It turned out that this representation was untrue. It was held in an action that was brought that the assumption of authority on the part of the agent amounted to a contract on his part that he had such authority, and that the executors of Wright were liable to Collen upon the contract. The fact that the agent honestly believed that he had authority is immaterial.

In the later case of *Starkey v. Bank of England* (1903), it appeared that one of two trustees of stock, standing in their joint names in the books of the Bank of England, sold it under a power of attorney, to which the signature of his co-trustee was forged, and the bank allowed a stockbroker who innocently acted under the

power to transfer the stock to other persons, and were held liable to replace the stock. It was held that the stockbroker was liable to indemnify the bank upon the ground that he had impliedly warranted his authority to the bank. In the head note to the case it is said: "Where a person, purposing to act as the agent of another, induces a third person to enter into a transaction with him on the faith of such agency, whereas in fact no such agency exists, he is liable for any injury sustained by such third person in consequence of such untrue representations, whether or not he believed he was acting with the authority of the alleged principal."

Extent of
agents'
liability

It need scarcely be mentioned that in order to make the agent personally liable the third party must have relied upon the existence of the authority in fact. He will not be liable if, at the time of purporting to contract he expressly disclaims any present authority (*Halbot v. Lens* (1901)). If the original authority of the agent has been revoked by the death of the principal, or if a company is the principal and an agent has been acting for them, there will be no liability on the contract attaching to the agent. But he will be liable for representing his authority as continuing, although in fact it has ceased, even if he has acted in good faith (***Yonge v. Toynbee*** (1910)). It seems that where a principal has "held out" a person as agent, and the agency has been terminated without notice to the third party, the third party may elect whether to sue the principal on the contract, or the agent for breach of warranty of authority. In *Drew v. Nunn* (1877), a wife bought goods as her husband's agent when, in fact, the husband had become insane, so that the agency was terminated. It was held that the husband was liable to the shopkeeper, as he was estopped from denying that his wife was his agent until the termination of the agency had been communicated to the third party.

Damages
recoverable

The damages recoverable from the agent will be those which naturally flow from his act. Thus, where an agent bought a ship without authority for £6,000, and his principal repudiated the contract, the seller was

held entitled to recover £500 as damages, because on a resale he had been unable to obtain more than £5,500 for the ship (*Simons v. Patchett* (1857)). The same principle is applied in other cases (*Meck v. Wendt* (1888), and *Salvesen v. Oscar II* (1905)).

Where an agent has contracted on behalf of a non-existent person as his principal, he is personally liable upon the contract; for example, where a contract has been made on behalf of a company which is not yet registered (*Kelner v. Baxter* (1866)).

Agent contracting for non-existent principal

Fraud of Agent. It may be laid down as a general rule that if an agent commits a fraud in the course of his agency, whilst acting within the scope of his authority, the party injured has a right to sue the principal for the damage sustained by such fraud (*Barwick v. English Joint Stock Bank* (1867)). This right, however, does not exclude the personal liability of the agent: he may be sued also. But a principal will not be liable for any fraud committed by the agent outside the scope of the latter's authority (*British Mutual Bank v. Charmwood Forest Rly. Co.* (1887); *Thorne v. Heard* (1895)). Forgery was held to be outside the actual or ostensible authority of an agent so as to free the principal from liability therefor in *Slingsby v. District Bank* (1932). As long, however, as the fraud is committed by the agent within the scope of his authority the principal is liable, and it makes no difference that the fraud was not committed for the principal's benefit, but for the benefit of the agent (*Lloyd v. Grace Smith & Co.* (1912)). Before the decision in *Lloyd v. Grace Smith & Co.*, it was thought that the fraud had to be for the principal's benefit in order to render him liable. The facts of that case were briefly as follows: The plaintiff consulted the defendants, a firm of solicitors, with reference to certain property of which she was possessed. She was referred to the managing clerk of the firm, who induced her to execute a conveyance of the property to himself. He then mortgaged the property and pocketed the proceeds. The firm was held liable to reimburse the plaintiff on the ground that the acts of the clerk were

Principal's liability for agent's fraud

Within scope of authority

Not necessary for principal's benefit

within his authority from the nature of his employment, and that the question of the transaction being for his own benefit was irrelevant. If the agent is sued for any fraud innocently committed within the scope of his authority, he is entitled to be indemnified by his principal.

Corporation as
principal

A corporation is always just as liable for its agent's torts, when the agent is acting within the scope of his employment, as a private person. This extends even to the publication of a libel (*Citizens Life Assurance Co. v. Brown* (1904)).

Modes of
termination

Termination of Agency. The relationship of principal and agent, so far as it affects third parties, may be terminated in any one of the following ways—

- (1) By the agreement of the parties.
- (2) By effluxion of time.
- (3) By the completion of the particular business for which the agency was created.
- (4) By the destruction of the subject-matter.
- (5) By revocation on the part of the principal. It must be noted that an agency cannot be terminated in a summary fashion if the contract of agency has been created for the benefit of the agent, and the benefit has not been reaped. Thus, if an agent is appointed for a definite time at a fixed salary, the agency cannot be put an end to without some compensation being paid to the agent for the loss which he will sustain by the revocation. Notice of a revocation of authority ought to be given to all persons who have had dealings with the agent on the principal's behalf, otherwise the principal will be bound by future transactions between such persons and his former agent.
- (6) By the renunciation of the agent. The agent on renouncing must compensate the principal for any loss which may arise out of the renunciation.
- (7) By the death or insanity of the principal or the agent (*Smout v. Ilberry* (1842); *Drew v. Nunn* (1879); and *Yonge v. Toynbee* (1910)).
- (8) By the bankruptcy of the principal.
- (9) By the agent joining the army (*Marshall v. Glanvil* (1917)).

CHAPTER X

PARTNERSHIP

Definition of Partnership. Partnership is defined by the Partnership Act, 1890 (53 & 54 Vict., c. 39), sect. 1, as "the relation which subsists between persons carrying on a business in common with a view of profit."

A company is also a combination of persons; but there is a great difference between a partnership and a limited liability company. In the former the individuality of each member is not entirely lost, and a partner cannot, in many cases, escape personal liability for what is done in the name of himself and his co-partners. But in a limited company the individuality of the members is lost in the new entity established by law (**Salomon v. Salomon & Co.** (1897)). The section of the Partnership Act which is above quoted, and from which the definition of a partnership is taken, continues as follows: "But the relation between members of any company or association which is (a) registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint-stock companies; or (b) formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter, or (c) a company engaged in working mines within and subject to the jurisdiction of the Stannaries: is not a partnership within the meaning of this Act" The Stannaries Court, which had enjoyed local jurisdiction in Devonshire and Cornwall for many centuries, was abolished in 1897 by the Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict., c. 45).

Partnership
and limited
company
distinguished

The Firm Name. The combination of persons acting in partnership is generally known as the "firm," and the name under which trading takes place is called the "firm-name." As a man is entitled to trade in his own name, so a combination of persons can trade in the name of all the partners, even though there may be

Injunction to
restrain use of
particular
name

another firm in existence which is known by the same firm-name. The only case in which an injunction can be obtained restraining one firm from using a firm-name which is being used by another is where it is clearly shown that a fraud is being perpetrated or is in contemplation. No combination of persons can so act as to claim for themselves the benefit of the reputation which another firm has acquired, on the ground that it amounts to a fraud on the public (*Croft v. Day* (1843), *Singer Machine Manufacturers v. Wilson* (1877); *Mas-sam v. Thorley's Cattle Food Company* (1880); *J. & J. Cash, Limited v. Joseph Cash* (1902)). A good illustration is furnished by the case of *Turton v. Turton* (1889). The plaintiffs had for many years carried on the business of steel manufacturers in Sheffield under the name of Thomas Turton & Sons. The defendant, John Turton, had also for many years carried on a similar business in the same town, at first as John Turton, then as John Turton & Co. In 1888 he took his two sons into partnership and carried on the same business as John Turton & Sons. There was no evidence that the defendants imitated the trade-marks or labels of the plaintiffs or otherwise attempted to deceive the public. It was held that although there was a probability that the public would be occasionally misled by the similarity of the names, the plaintiffs were not entitled to an injunction restraining the defendants from the use of the name John Turton & Sons. But no two companies bearing the same title can be registered, except when one company is being wound up and another is being formed for the purpose of carrying on the business.

Registration
of Business
Names

By the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), it is provided that whenever a partnership is carried on under a name which does not disclose the full names of each of the partners, the partnership name has to be registered, and the full names of each of the partners has to be disclosed on every trade catalogue, trade circular, showcard, or business letter issued by the firm. In addition, if any

partner is not a natural-born British subject, his nationality has to be stated, and if he has been naturalised, a statement of his nationality of origin must be given. Similarly, any change of name must be disclosed.

Limit on Number of Members of Partnership. By sects. 357 and 358 of the Companies Act, 1929, no partnership formed with the object of carrying on business for gain can be established if it consists of more than twenty persons, and in banking businesses the number of partners must not exceed ten. A combination consisting of more than these numbers is illegal, and the contract of partnership is void, unless there has been a registration under the Act, or unless the partnership is incorporated.

Not more
than 20
persons

Effect of the Partnership Act. By the Partnership Act, 1890, the substantive law upon the subject has been practically codified. But the whole law is not to be found within the provisions of the Act itself, since it is specially provided by sect. 46 that "the rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of the Act."

Application
of rules of
common law
and equity

Who is a Partner? It has been already stated that partnership is the relation existing between persons who carry on a business in common with a view to profit. At one time it was assumed that if a person could be shown to be a sharer in the profits of a business, that was enough to constitute him a partner, and to render him liable upon partnership contracts. It was so in the case of *Waugh v. Carver* (1794). That doctrine was really destroyed by the well-known case of **Cox v. Hickman** (1860), when it was held that the true test of partnership liability was not participation in profits, but whether the business was carried on by persons acting as the agents of the parties sought to be made liable. Still, the receipt of a share of the profits is very strong evidence of the existence of a partnership, and gives rise to a presumption that such is the fact until it is rebutted. The whole of the circumstances of any

Share of
profits

particular case will be considered when it is sought to make a person chargeable with the partnership debts, and the Court will draw its own inferences from the facts placed before it (*Pooley v. Driver* (1876); *Ex parte Delhasse* (1878); *Pawsey v. Armstrong* (1881); *Badeley v. Consolidated Bank* (1888); *Davis v. Davis* (1894); *King v. Whichelow* (1895); *In re Young* (1896)). An illustration is supplied by a Scotch case, *Stewart v. Buchanan* (1904). (It should be noticed that the Partnership Act, excepting only the sections referring to bankruptcy, is applicable to Scotland.) The defender let certain premises to A for a term of years, and agreed to advance moneys for fitting them up for business purposes, such fittings to become the defender's property on the termination of the lease if the moneys advanced had not been repaid. At the same time by another agreement the defender advanced other moneys to be placed to his credit on loan capital account in connection with the business, on which he was to receive interest at the rate of 7½ per cent per annum, payable monthly. It was the duty of A, with the defender's consent, to engage assistants for the business, to keep proper books, to devote his whole time to the business, and to charge the same with the payment of his own salary, which salary might be increased from time to time with the consent of the defender. The receipts were to go in paying salaries and current charges, and in payment of interest on the defender's outlays on the loan capital account. Any surplus was to be divided between A as profit and the defender as extra interest. The defender could in certain events appoint a cashier, whose salary was to be paid by A, for the purpose of collecting all sums and making all payments in connection with the business. The agreement further provided that the defender should not be or be held to be a partner in the business, or liable for its debts and obligations. Upon the whole facts of the case and considering the control that was retained, the defender was held to be a partner in the business, and liable for its debts.

The Partnership Act itself (sect. 2) lays down certain rules for determining whether a partnership does or does not exist—

(1) "Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

Test under the Partnership Act

Co-ownership

(2) "The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;

Sharing gross returns

(3) "The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business; but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

Sharing profits

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

Receipt of debt by instalments out of profits

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

Remuneration by share of profits

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

Widow or child of deceased partner receiving portion of profits as annuity

(d) The advance of money by way of a loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits arising from carrying on the business, does not of

Receipt of interest, varying in amount with profits, on sum advanced to partnership

itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto;

Receipt of
portion of
profits in
consideration
of sale of
goodwill

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not by reason only of such receipt a partner in the business or liable as such."

But although the liability is thus lightened by statute, a creditor under (d) and (e) of subsect. (3) of the foregoing section is not placed in the same position as other creditors of the partnership, but is postponed in case of insolvency. The 3rd section of the Act is as follows: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower, or buyer for valuable consideration in money or money's worth, have been satisfied."

Effect of
insolvency on
persons
receiving
profits in
return for
advancing
money to
partnership
or selling
goodwill

An ingenious attempt was made in the case of *In re Fort* (1897), to override the provisions of this last section. Fort was engaged in business, and money had been advanced to him by one Schofield. It was agreed that Schofield should be paid interest at the rate of 5 per cent upon what he had advanced and likewise should receive a half share of the net profits of the business. The agreement was not in writing. The fact of the absence of any instrument in writing imposed upon Schofield the onus of proving that no partnership existed between him and Fort. Upon an action being brought a jury decided in Schofield's favour. Fort then

became bankrupt, and Schofield put in a proof in this bankruptcy for the debt owing to him, and claimed that he was entitled to be placed on an equality with the other creditors, since there was no document in writing in existence. It was held, however, that the mere absence of evidence in writing did not entitle him to be so placed, and that he must be postponed until all the other creditors had been paid twenty shillings in the £. The benefit of sect. 2, subsect. (3) (d) of the Act as a defence is not to be used as a weapon of attack under sect. 3.

In any case, however, if a creditor is secured by means of a charge or mortgage upon the property of the bankrupt, his rights under such charge or mortgage will not be affected.

Creditor
secured by
charge or
mortgage

As persons who share in the profits of a business may not be partners, as far as liability to the world at large is concerned, so persons who do not share in the profits may be held to be partners. For instance, a man may act in such a manner that it would be generally supposed that he was connected with the business. This is what is called "holding-out." By sect. 14 of the Partnership Act it is enacted, "Every one who by words spoken or written or by conduct represents himself, or knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made." The law has not prescribed any particular form of "holding-out," and therefore each case must obviously depend upon its own facts. No doubt great hardships are at times imposed upon people who innocently or carelessly allow themselves to be drawn into commercial transactions, but a provision of this character is absolutely necessary to prevent frauds being practised upon creditors. A person so lending his name to a business, without having any real interest in it, is

Holding-out

Nominal and
dormant
partners

called a "nominal" partner. He is to be distinguished from a "dormant" partner, whose name does not appear to the world, but who shares in the profits.

Capacity to
contract

Formation of Partnership. Subject to what has already been said as to statutory exceptions any number of persons may combine to form a partnership. They must, however, have the capacity to contract according to the general rules applicable to all contracts. If an infant is a partner in a firm, the members of the firm who are not infants are alone personally liable upon any partnership contract, and in the event of bankruptcy proceedings being taken against the firm the infant partner is excluded from such proceedings, although the whole of the partnership assets are available for the partnership debts (**Lovell & Christmas v. Beauchamp** (1894)). If any one of the partners is an alien, the partnership is dissolved as soon as war breaks out between this country and the country to which the alien belongs.

Form of
contract
immaterial

The contract of partnership is one of a consensual nature, that is, it is formed by consent alone. No particular formality is required. It may be created orally, or it may be inferred from the conduct of the parties. It appears also, from the language of Kekewich, J., in *In re De Nicols, De Nicols v. Curlier* (1900), that if it can once be shown that an agreement for partnership by parol exists, it will be enforced in spite of its apparent contravention of any of the provisions of the 4th section of the Statute of Frauds.

Articles of
Partnership

Such a thing, however, is extremely rare. The general practice is to have a written agreement or a deed drawn up, which contains all the provisions of the partnership contract. The document is styled the "Articles of Partnership." What it should contain must be decided by the parties themselves. So much must depend upon the amount of capital each party puts into the business, and upon the business capabilities of each of the partners, that no rules can be laid down which will meet with the needs of every case. Any good book on practice will supply plenty of useful precedents, and these

can be varied according to the wishes of those interested. The Articles of Partnership may be altered at any time with the consent of all the parties to them.

When a partnership has been formed, no new partner can be admitted except with the consent of all the old ones, since a contract cannot be altered against the wishes of any of the original parties to it (sect. 24 (7)). In many cases when a new partner is introduced into the old firm, especially if the business is a good one and well established, a sum of money is demanded as a price for the introduction. This is called a "premium." It is generally provided that if the partnership comes to an end before the time fixed for its determination, a proportionate part of the premium shall be repaid to the person who has provided it.

Admission of
new partners

It is almost invariably set out in the Articles of Partnership for what period the partnership is to last. Should this period be exceeded, the partnership (beyond the agreed period) is called a "partnership at will," and may be terminated at any time. But as long as it lasts the terms of the original partnership agreement are applicable to a partnership at will (sect. 27). If no fixed term has been agreed upon for the duration of the partnership, any partner can determine it at any time on giving notice of his intention to do so to all the other partners. A notice in writing is quite sufficient even though the partnership was originally constituted by deed (sect. 26).

Duration of
partnership

It should be noticed that just as no new partner can be introduced into a firm without the consent of all the existing partners, so no member can be expelled by a majority of the partners unless there is an express power of expulsion conferred by the partnership agreement (sect. 25).

Expulsion of
members

Relations of Partners to One Another. These relations are generally and very properly provided for by the Articles of Partnership. In the absence of any such the following are the general rules governing these relations contained in sects. 24, 28, and 30 of the Act of 1890—

Governed by
Articles

Provisions of
Act in
relation
thereto

1 Equal share of capital and profits and equal liability for losses

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

2 Indemnification of partner by firm

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a) In the ordinary and proper conduct of the business of the firm, or

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

3 Interest on capital advanced beyond amount agreed

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent per annum from the date of the payment or advance.

4 No right to interest on capital

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

5 All may take part in management

(5) Every partner may take part in the management of the partnership business.

6 No right to remuneration for acting in partnership business

(6) No partner shall be entitled to remuneration for acting in the partnership business. But exceptional and extra work and trouble caused by the conduct of one of the partners may, in certain circumstances, entitle the others to some extra remuneration (*Airey v. Borham* (1861)).

7 Rights of majority of partners

(7) Any differences arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the business without the consent of all existing partners.

8 Partnership books

(8) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them. A partner may depute this work to an agent, but an undertaking must be given by the agent not to make use of the information which he acquires except

for the purpose of confidentially advising his principal (*Bevan v. Webb* (1901)).

(9) Each partner is bound to render true accounts and full information of all things affecting the partnership to any other partner or to his legal representative.

9. Full disclosure

(10) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection (*Aas v. Benham* (1891)). This provision applies to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs of the partnership have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

10. Duty of partner to account to firm

(11) If a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business.

11. Partner carrying on competing business unknown to other partners

The last two of these rules show that it is essential in all partnership transactions that there should exist the utmost good faith (*uberrima fides*) between the partners of the firm. So essential is this considered that in *Law v. Law* (1905), it was held that, on a sale of his share in a partnership business by one partner to another, where the purchaser knew more about the accounts of the business than did the vendor, there was a duty resting upon him to put the vendor in possession of all material facts with reference to the partnership assets and not to conceal what he alone knows.

U *uberrima fides*

All the property originally brought into the business or subsequently acquired by the firm is partnership property, and must be held and applied for the purposes of the partnership alone.

Partnership property

Relations of Partners to Third Parties. The Articles of Partnership regulate the duties of partners only as far as they themselves are concerned. They are, if made by deed, the contract which binds the partners

Acts of partner
within scope
of business
binding on
others

to each other, and, if made by any other instrument, evidence of the contract which exists. Third parties have no right to inspect these articles, as they can, and must, at their peril, examine the Articles of Association of a limited liability company. As a result, any act of a partner, which is done within the scope of the partnership business, and in the ordinary course of business, is binding upon all the other partners, unless the person with whom the partner deals actually knows that the particular act is forbidden.

Partner as
agent

In fact, every partner is an agent for the firm and his other partners for the purposes of the partnership, and all the ordinary rules of agency apply to his acts. His position is that of a general agent. This appears to be the state of the law as laid down in sects. 5, 6, 7, 8, 10, and 11 of the Act of 1890, and it is exemplified by the cases of *Ex parte Darlington Banking Co.* (1864); *Baird's Case* (1870); and *Yorkshire Banking Co. v. Beatson* (1880).

Acts outside
scope of
partnership
business

But for those acts which are outside the scope of the partnership business, the other members of the firm are not liable, unless there is a subsequent ratification. And, for the technical reason, which has been previously mentioned, a partner cannot bind his firm by a deed signed in his own name unless he is empowered to do so by a power of attorney. Further, by sect. 13 of the Act, if a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested in it. This does not affect any liability incurred by any partner by reason of his having notice of a breach of trust, nor does it prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Test of
authority

It will be obvious, on the slightest consideration, that the question of the authority of one partner to bind his fellow partners must frequently raise some difficult points. The test to be applied, speaking generally, is this: Did the partner who entered into the

contract act as the agent of the other partners? A leading authority is the case of *Sandilands v. Marsh* (1819), where it was held that a navy agent, who did not usually deal in annuities, bound his firm by guaranteeing the payment of an annuity which he had purchased for a customer. It was in that case that Abbott, C.J., gave as an illustration of the liability of one partner for the acts of another the instance of two horse dealers, in partnership, who agreed between themselves never to warrant a horse. The fact of the existence of such an agreement would not free one of them from liability if the other did give a warranty.

Amongst the general powers of a partner to act so as to bind his fellow partners, the following may be usefully noticed. If the partnership is a trading one, any partner may bind the firm by drawing, accepting, or endorsing bills of exchange, or making or endorsing promissory notes. But it must be done in the name of the firm. If a partner does any of these things in his own name he is personally liable upon the bill or note (*Owen v. Van Uster* (1850); *Edwards v. Barnard* (1886)). But if the firm carries on business in the name of the individual partner who draws, accepts, or endorses a bill of exchange or promissory note, the drawing, accepting, or endorsing is an act for which the firm is *prima facie* liable (*Yorkshire Banking Co. v. Beatson* (1880)). As a firm of solicitors is not a trading partnership, no partner therein has authority to bind his fellow partners by dealing with bills of exchange or promissory notes (*Hedley v. Bainbridge* (1842)).

Again, a partner may sell, insure, or pledge the personal effects of the firm, and may purchase such goods as are necessary for the business of the firm and are ordinarily dealt in by them.

If land, however, is to be bought, sold, leased, or mortgaged, the whole of the partners must join in the conveyance, unless authority is given to one of the partners to act for the rest by power of attorney.

A partner has authority to release debts due to the firm, to receive moneys due to it, and to give receipts

Examples of
general powers
of partners

1. Negotiable
instruments

2. Sale,
insurance, and
pledge of firm
goods

3. Purchase,
sale, lease,
or mortgage
of land

4. Receipts and
release of
debts

therefor. But it must be noted that if two persons, who are not partners, pay money into a bank on a joint account, a payment of the bank to one only will not release the banker from his liability to pay the other (*Innes v. Stephenson* (1831)).

Borrowing money, engaging servants, etc.

Borrowing money on the credit of the firm, defraying incidental expenses, and engaging servants, provided these matters are connected with the business of the firm, are other examples of the acts of one partner which will bind the other members. In all these cases it is immaterial that some of the partners are nominal or dormant partners, or unknown and not named at the time.

No power to bind by guarantee

It is clear law that a partner is unable to bind his firm by a guarantee, since this is outside the scope of any ordinary business, and he has no implied authority to bind it by a submission to arbitration (*Adams v. Bankart* (1835); *Farrar v. Cooper* (1890)).

Liability for acts in excess of authority

If a partner exceeds his authority and does an act outside the scope of the ordinary partnership business, he renders himself personally liable in the same manner as an agent who acts in excess of his authority and whose act is not ratified.

Effect of dissolution on powers of partner

By sect. 38 of the Partnership Act, 1890, it is provided that after the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. But the firm is in no case bound by the acts of a partner who has become bankrupt. This last proviso, however, does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Effect of bankruptcy of partner

Liability of Partners. The nature of the liability of the partners of a firm will have been gathered generally from the preceding section and from the chapter on

Agency. As in agency the liability is not confined to cases of contract (*Hamlyn v. Houston & Co.* (1903), where one partner bribed a servant of another firm in order to obtain information which it was the business of the partnership to obtain by legitimate means, and the court held the partnership liable).

The general liability of partners is set out below, but this liability may be curtailed in certain cases if advantage is taken of the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24) (see page 167, *post*).

The liability of a partner for the debts and obligations of the partnership commences at the moment he becomes a member of the firm, but he is in no way liable for debts previously contracted. So long as he remains a member of the firm he is jointly liable with his co-partners for all debts contracted whilst he is a member of it.

Duration of
liability for
debts

A partner's liability ceases, as to all subsequent debts, when he retires, except that when the business of the firm is continued, notice of retirement must be given (sects. 36, 37). An advertisement in the *Gazette* is a sufficient notice to all persons who have had no previous dealings with the firm; but to all those who have had dealings express notice, by circular or otherwise, must be given. Since a dormant partner does not appear to the world as a partner, no notice of his retirement is necessary, except to those persons who knew that he was a partner.

Retirement
of partner

An express agreement made between a creditor, the retiring partner, and the other members of the firm, may discharge the liability of the retiring partner for debts due to that creditor incurred during the partnership. In certain cases, without any express agreement, but from the conduct of a creditor and the remaining partners, such a discharge will be implied although it will not be implied from the mere fact that the creditor continues his transactions with the survivor, and at the survivor's request forbears to enforce payment of the debt (*Winter v. Innes* (1838); *In re Head, Head v. Head* (1893); *In re Head, Head v. Head*

(No. 2) (1894)). A discharge of this kind is known as a "novation," that is, the substitution of a new liability for the old one (*Bilborough v. Holmes* (1876)).

Continuing
guarantee

A continuing guarantee or a cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee or obligation was given (sect. 18).

Death of
partner

When one of the partners dies, and the partnership is thereby dissolved, his private property is liable for the payment of the partnership debts, so far as they are unpaid, subject to the prior payment of his private debts. But the private creditors of the deceased partner must first be paid in full before any claim can be made by the creditors of the firm.

Extent of
partner's
liability

The extent of the liability of each partner in a firm is the whole of the firm's debts. This liability is a joint one and not several, subject to the exception stated in the last paragraph. If a creditor obtains a judgment against the firm he can issue execution against the property of the partners thereof. If instead of proceeding against the firm or the whole of the partners he proceeds against some of them and obtains a judgment, he can issue execution only against the property of those against whom he has obtained the judgment. The rest of the partners are freed from liability, and this is the case even though the execution turns out to be unproductive. The joint liability is merged in the judgment (*Kendall v. Hamilton* (1879); *McLeod v. Power* (1898), 2 Ch. 295; *Parr v. Snell* (1923)).

Private debts
of partner

No partner is liable for the private debts of another partner, nor can an execution issue against the partnership property except upon a judgment which has been obtained against the firm. A charging order, however, may be obtained against any partner's interest in the partnership property, and the Court may appoint a receiver to take the share of the partner's profits in the same, and direct such inquiries as it thinks fit. The

other partners may at any time redeem the interest charged, or purchase it if it is offered for sale (sect. 23).

Assignment of Share in Partnership. When a partner assigns his share in the partnership to a third party, either absolutely or by way of mortgage, or by a redeemable charge, such assignment does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee to receive only the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. If a dissolution of the partnership takes place, whether as respects the whole of the partners or the assigning partner only, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution (sect. 31). Upon the construction of this section reference should be made to the cases of *Watts v. Driscoll* (1901); and *In re Garwood's Trusts*, *Garwood v. Paynter* (1903). The former case laid down the rule that the assignee is entitled to his share in the partnership on its dissolution, and is not bound by any dealings with the share as between the partners. In the second case it was held that the payment of salaries to partners for work done was part of the "management or administration" and bound the assignees.

Rights of assignee

Dissolution of Partnership. If there are Articles of Partnership, it is almost certain that some clause or clauses in them will have reference to the termination of the partnership. Subject to any such terms, however, a partnership is dissolved—

How dissolution effected?

(1) If entered into for a fixed time, by the expiration of that term.

1. Expiration of fixed term

2. Termination of undertaking

(2) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking.

3. Notice

(3) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership, or by the mutual consent of all the partners.

4. Death or bankruptcy

(4) By the death or bankruptcy of any partner.

5. Share of partner becoming charged for separate debt

(5) By a partner suffering his share of the partnership property to be charged under the Partnership Act for his separate debt. This is only a cause for dissolution at the option of the other partners.

6. Partnership business becoming illegal

(6) Irrespective of the terms of any agreement a partnership will be dissolved upon the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership. For example, a partnership between a British subject and a German subject, the latter being resident in Germany, in a business carried on in England, the continuance of which would have involved intercourse with the enemy, was declared dissolved by and at the date of the outbreak of war between the two countries (*Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie* (1917)).

It is not uncommon to find that there are different rules applicable to sharing profits on the death and on the voluntary retirement of a partner. This was emphasised in *McLeod v. Dowling* (1927), where a partner posted a notice of retirement, but died before its receipt by the co-partners. The court held that the rules as to distribution in the event of death and not those as to distribution on retirement were applicable.

Decree of dissolution by court

Sometimes the court will decree a dissolution of the partnership. The power is entirely discretionary, but, as a rule, a dissolution will be decreed, (a) when a partner becomes a lunatic, or incapable of performing his part of the partnership contract, (b) when a partner has been guilty of conduct prejudicially affecting the carrying on of the business of the firm, (c) when a partner is guilty of wilful misconduct, (d) when the business can be carried on only at a loss, (e) when

circumstances have arisen which render it just and equitable that there should be a dissolution.

There is no definition of the circumstances under which the court will think it just and equitable to decree a dissolution. The facts of each case must be separately considered. Any partner can compel the others to acquiesce in a proper public notice of dissolution being given (*Hendry v. Turner* (1886)).

In the case of *Carmichael v. Evans* (1904), a partnership had been established, and by the articles the managing partner was entitled to determine the partnership as to any particular partner if that partner was guilty of a flagrant breach of any of the duties of a partner or was addicted to conduct detrimental to the business carried on, that of general drapers. It was held that a conviction at a police court of one of the partners for travelling without a ticket was such conduct as entitled the managing partner to exercise his power of determining the partnership as to that partner.

Bankruptcy. Technically, of course, a firm cannot be made bankrupt, therefore an adjudication order is made against the individual partners. The Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), sect. 33 (6), provides that in the event of the bankruptcy of partners, the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner in the payment of his separate debts. If there is a surplus of the separate estates it is to be dealt with as part of the joint estate and if there is a surplus of the joint estate, it is to be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

After Dissolution. The effects of a dissolution may be, and generally are, provided for by the Articles of Partnership. But if this is not so, then it is necessary for the whole of the partnership property to be converted into money, and dealt with in the manner provided in the Partnership Act.

On the dissolution of a partnership every partner and for that purpose any partner or his representative

Priorities

Real

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Goodwill on
sale of
business

Payment of
debts and
application of
residue

entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm. He is entitled to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners of the firm; may on the termination of the partnership apply to the court to wind up the business and affairs of the firm (sect. 39).

Apportion-
ment of
premiums

Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that time otherwise than by the death of a partner, the court can order the repayment of the premium, or of such part of the premium as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued. Repayment is not ordered, however, where in the judgment of the court the dissolution is wholly or chiefly due to the misconduct of the partner who paid the premium, or where the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium (sect. 40).

Partnership
dissolved on
ground of
fraud or
misrepresentation

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties to it, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (sect. 41).

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets.

Distribution of profits made after death or withdrawal of partner but before final settlement

Where, however, by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and the option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with its terms, he is liable to account as if there was no option (sect. 42).

Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death (sect. 43).

Share of outgoing partner's debt

In settling accounts between the partners after a dissolution of partnership, the following are the rules laid down by sect. 44 of the Act, and which, subject to any agreement, are to be observed—

Distribution of asset final settlement / account

(1) Losses, including losses and deficiencies of capital, are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;

Goodwill on sale of business

(2) The assets of the firm, including the sums, if any, contributed by the partners to make up losses &

Payment of
debts and
application of
residue

entitled, as against the other partners in the firm, as all persons claiming through them in respect of the interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm. He is entitled to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners of the firm may on the termination of the partnership apply to the court to wind up the business and affairs of the firm (sect. 39).

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(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm (sect. 41).

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Distribution of asset final settlement & account

(1) Losses, including losses and deficiencies of capital, are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;

Goodwill on sale of business

(2) The assets of the firm, including the sums, if any, contributed by the partners to make up losses &

deficiencies of capital, are to be applied in the following manner and order—

(a) In paying the debts and liabilities of the firm to persons who are not partners therein;

(b) In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

(c) In paying to each partner rateably what is due from the firm to him in respect of capital;

(d) The ultimate residue, if any, is to be divided among the partners in the proportion in which profits are divisible.

Illegal Partnerships. It has been pointed out already (page 145, *ante*) that a combination of more than ten persons formed for the purpose of carrying on the business of banking, and of more than twenty persons for any other business, unless registered under some Act of Parliament or under letters patent, is illegal. This, however, only applies to associations formed after the passing of the Companies Act, 1862. An association composed of more than ten or twenty persons, formed before the Act, is quite legal, even though new members have been added from time to time since the Act (*Shaw v. Simmons* (1883)). So also is any association which has not for its object the carrying on of a business for the purposes of gain (*Smith v. Anderson* (1880); *Crowther v. Thorley* (1884); *In re Siddall* (1885)). In the following cases, however, the associations were declared illegal as being formed for gain or profit: *In re Padstow Total Loss Association* (1882) (mutual marine insurance association); *Jennings v. Hammond* (1882); and *Shaw v. Benson* (1883) (both cases of loan societies in which advances was made to members out of a fund created by the members).

Other partnerships are illegal if they are formed contrary to some statute, and so are those the objects of which are contrary to the common law, such as for robbery, or for the sale of indecent photographs.

If an illegal association is formed it is in this peculiar position—it cannot sue upon any contract into which

Combinations
of more than
twenty
persons

it has entered, but the individual members of the association are liable as partners without limitation.

Goodwill. The subject of goodwill forms no part of the law of partnership, but as goodwill is so closely connected with partnership it may be most conveniently considered in the present chapter.

It is not easy to give a definition of goodwill, although the term is an exceedingly familiar one. In one sense it means every practical advantage that has been acquired by an established firm in carrying on a business under a particular name and style. Lord Eldon described it as "nothing more than the probability that the old customers will resort to the old place" (*Crutwell v. Lye* (1810)). But this definition is unsatisfactory.

Definition

Lord Lindley says: "The term goodwill can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its goodwill has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that goodwill has no meaning except in connection with a continuing business; and the value of the goodwill of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on." (Lindley on Partnership, 9th Edition, page 534).

The goodwill of a business is frequently its most valuable asset, and there is a legal right or interest in it, an incorporeal right, which is most jealously guarded. On a conveyance or an agreement for the sale of the goodwill of a business an *ad valorem* stamp duty is levied. What is the value of the goodwill of a business must depend entirely upon circumstances.

Incorporeal right

When a business is sold, the goodwill passes to the transferee, and it is most important that nothing should be done by the transferor to interfere with the conduct of the business. The common method adopted is for

Goodwill on sale of business

the transferor to enter into an agreement with the transferee not to compete with him in any similar business. If the agreement is not too wide to be enforced, according to the rules already laid down in the chapter which deals with restraint of trade (page 60, *ante*), a transferor will be bound by the agreement. In the absence of any special agreement, the question as to what extent the transferor is bound not to enter into competition with the old firm has caused great trouble to the courts. After a series of varying decisions the present state of the law may be thus summed up, as the result of the decision in *Trego v. Hunt* (1896). That person alone who has acquired the goodwill of a business is entitled to represent himself as continuing or succeeding to the business of the transferor. When there is no special provision on the sale of the goodwill the transferor is at liberty to set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser. The transferor may also publicly advertise his business with similar limitations as to circularising the customers of the former firm. The same principles are applicable to the case where a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner. This last-named case has been discussed and approved in *Jennings v. Jennings* (1898); *West London Syndicate v. Inland Revenue* (1898); *In re David & Matthews* (1899); *Gillingham v. Beddow* (1900). The rule as to solicitation of old customers as laid down in *Trego v. Hunt* was held, subsequently in *Curl Brothers, Ltd. v. Webster* (1904), to apply to all old customers, even to those who had before solicitation become customers of the transferor of their own accord.

The rules to be derived from the various cases referred to, as to soliciting the customers of the transferee, appear to apply only when the business is transferred

Soliciting
former
customers
after sale of
goodwill

voluntarily. Thus, in *Walker v. Mottram* (1881), it was held that a bankrupt will not be in any way restrained from setting up a fresh business, similar to that which he has been carrying on, and soliciting his old customers notwithstanding that the trustee in bankruptcy has sold the goodwill to another person. Similarly, a debtor who has assigned his business to a trustee for the benefit of creditors is not precluded, in the absence of express stipulation to the contrary, from soliciting the customers of the old business (*Farey v. Cooper* (1927)). The executors of a person who has contracted to sell the goodwill of a business, however, will be restrained from soliciting the customers of the business (*Boorne v. Wicker* (1927)). In the same way, if the goodwill of a business is sold, whatever the covenants may be which are entered into by the transferor, the wife of the transferor is in no way bound by them, and may open a new business on her own account, trading separately from her husband, at once, and solicit the old customers (*Smuth v. Hancock* (1894)).

When former customers may be solicited

As the goodwill is often the most valuable part of the partnership property, it should always be sold on the dissolution of a partnership, unless otherwise agreed upon. If there is no agreement as to sale, each member of the old firm who continues to carry on a business of the same kind after the dissolution of the partnership is entitled to the goodwill (*Hill v. Fearis* (1905)).

Necessity for sale on dissolution of partnership

Limited Partnerships. The Limited Partnerships Act, 1907 (7 Edw. 7, c. 24) was passed in response to a considerable demand for statutory authority to create limited partnerships. The passing of the Companies Act in the same year, however, enabling companies consisting of only two members to be formed with the benefits of limited liability, has prevented full advantage being taken of the provisions of the Limited Partnership Act. But, as there are still some limited partnerships in existence and as more may be formed, an outline of the main provisions of the Act will prove useful.

A limited partnership must not consist in the case of a banking concern of more than ten persons, or

Number of members

in the case of other concerns of more than twenty persons.

Obligations of
general
partners

There must be one or more general partners, who will be liable for all the debts and obligations of the firm, and then there may be one or more limited partners who shall at the time of entering into such partnership contribute thereto a sum or sums, as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

Liability of
limited
partners

Obligations
of limited
partners

A limited partner cannot, during the existence of the partnership, draw out or receive back any part of his contribution, and he must not in any way interfere with the conduct of the business.

Registration

The limited partnership must be registered, and the register must be regularly kept up to date, so that the public may be as fully acquainted with the facts concerning a limited partnership as with those of a limited company.

Death,
bankruptcy, or
lunacy of
limited
partner

The death, bankruptcy, or lunacy of a limited partner does not cause a dissolution of the company.

Application of
ordinary
rules to
limited
partnerships

The Act of 1890 and the rules of law applicable to partnerships apply to limited partnerships except so far as such Act or rules are inconsistent with the express provisions of the Limited Partnerships Act, 1907.

CHAPTER XI

COMPANIES

THE law as to joint-stock companies was consolidated by the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), but much of the law of companies is to be found in the decisions of the courts, and, by reason of its extensive nature, nothing further can be attempted in the present volume than a summary of the means by which a joint-stock company comes into existence, the methods by which it is compelled to carry out its objects, and the manner in which it comes to an end.

Definition. In Shelford's *Joint-Stock Companies Acts*, (company defined) the definition of a joint-stock company is given as follows: "An association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each possesses one or more, and which are transferable by the owner." Lord Lindley, in his *Law of Companies*, has the following definition: "By a company is meant an association of many persons who contribute money or money's worth to a common stock, and employ it in some trade or business, and who share the profit or loss (as the case may be) arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable, although the right to transfer them is often more or less restricted." By sect. 322 of the Companies Act, 1929, a joint-stock company for the purpose of registration under the Act is defined as "a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and

partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons."

Company as
distinct
person in law

It must be most clearly understood that the individuality of the members who form a company is entirely distinct from the personality of the company: although inroads on this doctrine were made in *Daimler Co. v. Continental Tyre Co.* (1916). This is particularly noticeable when a company is composed of shareholders and directors who are aliens. Provided that the company is registered in this country, and therefore is domiciled here, it is *prima facie* an English company. The company itself has become a distinct person in law (*Hirst v West Riding Union Banking Co.* (1901),) and it therefore follows that a member of the company is in no way debarred from entering into contracts with the company in the same manner as any other individual (see **Salomon v. Salomon & Co.** (1897)) Again, a company, unlike an individual or a partnership, can appoint a person, other than a solicitor, to act for it in all legal affairs (*Kinnell v. Harding, Wace & Co* (1918))

Companies
and
partnerships

Unlike the creditors of a partnership, the creditors of a limited company can proceed only against the property of the company, and ordinarily there is no remedy beyond the amount of the fixed capital. The fixed capital is, in fact, the total amount of the property of the legal person.

In his judgment in *Smith v. Anderson* (1880), James, L. J., pointed out the difference between an ordinary partnership and a joint-stock company in the following words: "An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and

to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the parties themselves, unless the persons contracting with them authorised the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements."

Kinds of Companies. The formation of joint-stock companies in England, for trading and other purposes, dates back for more than three centuries. The most celebrated examples in the seventeenth century were the East India Company, the New River Company, the Hudson's Bay Company, and the Bank of England. Such companies as these were incorporated by Royal Charter or by special Act of Parliament. Other bodies also existed, which were similar in their character to what are now called companies; but these latter were not incorporated, and they were, therefore, in the eye of the law, nothing but private partnerships. Incorporation otherwise than by Royal Charter or by a special Act of Parliament became possible for the first time in 1844, while limited liability became recognised in 1855.

There are three kinds of companies which can be registered under the Companies Act, 1929.

(a) Unlimited companies. In companies of this class, every shareholder is liable for the debts of the company as in an ordinary partnership. But they possess the following advantages—the liability of each member ceases at the end of a year from the time he ceased to be a member, and the shares of the companies are transferable. Such companies are now extremely rare, and for several years past none have been registered.

Unlimited
companies

Companies
limited by
guarantee

(b) Companies limited by guarantee. There are very few of this class in existence. The memorandum of association of such a company contains a declaration to the effect that each member of the association will contribute an amount, not exceeding a fixed sum, to meet its liabilities so long as he remains a member, and for twelve months afterwards.

Companies
limited by
shares

(c) Companies limited by shares. Here the liability of each member is limited to the nominal amount of the shares which he holds. If the capital is once fully paid up, there is no further pecuniary liability resting upon anyone.

The third class is the most common and the most important kind of company, and the present chapter will be practically confined to the consideration of companies limited by shares. The special rules which are applicable to certain companies, such as banking companies, insurance companies, and companies formed for the purposes of charity, etc., must be gathered from books which are more exhaustive of the subject than this manual.

Seven in case
of public
company,
two in case of
private
company

Number of Persons Required. The smallest number of persons that can combine to form a joint-stock company is seven, or two in the case of a private company. Though there is no maximum in the case of a public company, except that the number of shareholders cannot exceed the number of shares, in the case of a private company, there is a maximum of fifty. It is provided by sect. 28 of the Act of 1929 that where the business of a company is carried on for six months after the number of its members has been reduced below seven or two, every member cognisant of the fact is personally liable for the payment of the whole of the debts of the company contracted after such period.

Private
companies

The statutory "private company" was introduced by the Companies Act, 1907. Previously a "one man company" had existed in which almost all the shares were held by one man, the remainder being allotted to six other persons to make the membership up to seven (*Salomon v. Salomon* (1897)). By sect. 24 of the

Act of 1929, a private company is defined as one which (a) restricts the right to transfer its shares, (b) limits the number of its members (exclusive of persons who are in the employment of the company, and of persons who, having been formerly in the employment of the company, were while in such employment and have continued after the determination of such employment, to be members of the company) to fifty, and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company. The maximum number of members is limited to fifty, but the minimum is two instead of seven. A private company can, under the Act, turn itself into a public company. When a private company is formed, the articles should be most carefully drawn up so as to set out what are the exact powers and rights of the shareholders, especially as to the transfer of shares. It is not easy to say what is exactly an invitation to the public to come in and take shares, and in many cases the line drawn between what is and what is not a public invitation is very fine. Great care must, therefore, be exercised as to the point, otherwise all the advantages under the Act will be lost.

A private company, as defined by the Act is exempt from several of the obligations imposed upon a public company, the principal of which are (a) sending certified copy of last balance sheet with the annual return, (b) placing restrictions upon the appointment of directors, (c) delivering a statement in lieu of a prospectus, (d) restricting the allotment of shares, (e) restricting the commencement of business, (f) holding statutory meeting, etc. The other exceptions must be learned from the Act itself, or from books which deal more exhaustively with the subject of joint-stock companies.

Advantage
of private
companies

FORMATION

The Promoter. The promoter of a company is a person or one of the persons who does the necessary preliminary work to form or float it. "The typical promoter—the promoter in the fullest sense of the term

Who is a
promoter?

—starts the scheme of forming the company, negotiates with the vendors (if any), gets together the board of directors, retains brokers, bankers, and solicitors for the company, has the memorandum and articles of association prepared, provides the registration fees, drafts the prospectus, pays for the expenses of issuing it, etc.; in a word, undertakes—to use the language of Cockburn, C.J.—to form a company with reference to a given project, and to set it going, and to take the necessary steps to accomplish that purpose.” (Palmer’s *Company Law*, 15th Edition, page 352.)

“The term promoter,” said Bowen, L.J., “is a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence” (*Whaley Bridge Co. v. Green* (1879)). Whether a person is or is not a promoter of a company is a question of fact, depending upon the circumstances of each case. Very little work done in connection with the formation of a company may render a person liable constructively. But solicitors and others who act merely as agents of promoters in their professional capacities are not liable as promoters.

Fiduciary
position of
promoter

A promoter stands in a fiduciary relationship towards the company which he promotes (*Erlanger v. New Sombrero Phosphate Co.* (1879); *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* (1899); *Omnium Electric Palaces, Ltd. v. Baines* (1914)). As a necessary consequence it follows—

Must not
make profit

(1) He must not make, either directly or indirectly, any profit at the expense of the company which is being promoted, unless the company itself has full knowledge of the facts and gives its consent. If any secret profit is made in violation of this rule, the company may, on discovering the same, compel the promoter to account for and surrender such profit.

Must give the
company the
benefit of all
contracts

(2) He must, when once he has begun to act in the promotion of the company, give to the company the benefit of any negotiations or contracts into which he enters in respect of the company. For example, if he

contracts to purchase property, he cannot rightfully sell to the company at a higher price than he gave. If he attempts to do so the company may, on discovering its rights, rescind the contract or compel the promoter to surrender his profits. In *Mann v. Edinburgh Tramway Co.* (1893), the promoters had agreed with contractors for the execution of works at a fixed price, and it was a part of the agreement that the contractors should bear the expenses of obtaining a special Act for the incorporation of the company. On the following day, by a second agreement which was not communicated to the directors of the company, two of the promoters agreed to relieve the contractors of the expense of procuring the special Act for £17,000. It was held that the company were entitled to the benefit of the second agreement.

(3) He must not make an unfair or unreasonable use of his position, and must take care to avoid anything which has the appearance of undue influence or fraud.

Must not make unfair use of his position

(4) He must take care to provide the company with an independent executive, although the promoters themselves, if there are several, or their nominees, may constitute the board of directors, if all material facts are disclosed.

Must provide independent executive for company

A company is not generally liable for the acts and engagements of its promoters before its incorporation, since, as it has been already pointed out in the first part of this manual, a person cannot contract on behalf of a non-existent person, and a company cannot subsequently ratify what has been done. But if a company has acquired property or rights by means of contracts entered into by its promoters, it will be equitably bound thereby. It is the general practice, when preliminary agreements are made, for the vendors of any property to contract with a trustee for the company, and to specify the terms on which the purchase is made. As soon as the company is registered a new agreement is endorsed on the old one, the former incorporating the provisions of the latter by reference.

Preliminary contracts

The remuneration of a promoter varies considerably.

Remuneration

Everything will depend upon the amount of work which he has done in connection with the formation of the company. The amount paid or intended to be paid to any promoter, and the consideration for any such payment, must be stated in the prospectus (Sect. 35 and Sched. IV of the Companies Act, 1929).

Liability in
respect of
issue of
prospectus

A promoter may render himself liable for losses which happen to shareholders and others, whenever he has taken part in the issue of a prospectus, and such prospectus either omits to give the information required by sect. 35 and Schedule IV of the Companies Act, 1929, or contains untrue statements.

Contents of
memorandum

Memorandum of Association. When the necessary number of persons has been obtained, a document, called the "memorandum of association," is prepared. In it the following matters must be clearly set forth—

1. Name of
company

(1) The name of the company. Any name (save certain special ones mentioned below) may be chosen, provided it does not so closely resemble that of an existing company as to be likely to deceive (*Madame Tussaud & Sons v. Tussaud* (1890)). If, by inadvertence, a company is registered with a name identical with or closely resembling that of another company, the first-mentioned company may, with the sanction of the Registrar of Companies, change its name. The last word of the name must be "limited," though the Board of Trade may, if they think proper, dispense with this addition if the company is not one formed for the purposes of pecuniary gain and profit. A company may not be registered with a name containing the words "Chamber of Commerce," except in special circumstances, or "Building Society," nor without the consent of the Board of Trade may the name contain the words "Imperial," "Royal," "Municipal," "Chartered," or "Co-operative." By special resolution, and with the sanction of the Board of Trade, the name of the company may be changed.

2. Situation
of registered
office

(2) The part of Great Britain—England (which includes Wales), or Scotland—in which the registered

office of the company is to be situated. The object of this provision is to fix the domicile of the company.

(3) The objects of the company. The greatest care is required in setting these forth with accuracy. A company exists only for the purposes which are stated in its memorandum of association, and any act done outside these powers is *ultra vires*, and therefore null and void (**Ashbury Railway Carriage Co. v. Riche** (1875); *In re German Date Coffee Co.* (1882); *London Financial Association v. Kelk* (1884); *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (1902); *Deuchar v. Gas Light & Coke Co.* (1924)). As a natural consequence a memorandum will frequently specify various trades and businesses which have apparently only the remotest connection with the main business of the company. It is then possible for the company to extend its operations at any time without applying to the court for leave to do so. The purpose of the objects clause is "to enable shareholders, creditors, and those who deal with the company to know what is its permitted range of enterprise" (*Egyptian Salt & Soda Co., Ltd. v. Port Said Salt Association* (1931)).

3 Objects of the company

By special resolution and subject to confirmation by the court, an alteration can be made in the objects clause, so far as may be required to enable the company—

Alteration of objects

(1) to carry on its business more economically or more efficiently; or

(2) to attain its main purpose by new and improved means; or

(3) to enlarge or change the local area of its operations; or

(4) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(5) to restrict or abandon any of the objects specified in the memorandum; or

(6) to sell or dispose of the whole or any part of the undertaking of the company; or

(7) to amalgamate with any other company or body of persons.

A carefully drawn memorandum will avoid the necessity for this procedure and its accompanying expense. The multiplication of sub-clauses of the objects clause of a memorandum may lead to unexpected developments, especially if there is a final sub-clause to the effect that all the sub-clauses should be independent and not subsidiary to the general purposes for which the company was established. At present, therefore, it seems that a company can, by means of such a clause, embark upon any conceivable scheme, however far removed it may be from the fundamental business of the company (*Cotman v. Brougham* (1918)).

4. Declaration that liability of members is limited

(4) A declaration to the effect that the liability of the members is limited.

5. Particulars as to capital and division into shares

(5) The amount of the nominal capital of the company, the number of shares into which the capital is divided, and the amount of each share.

Declaration of association

At the end of the document there is a declaration of association in the following form: "We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

Names, addresses and descriptions of subscribers

The names, addresses, and descriptions of the seven (or two) subscribing persons are annexed. A subscriber usually signs his own name, but he can authorise an agent to do so for him (*In re Whitley Partners* (1886)). Each signature must be duly attested. It is a common practice for the various signatures of the subscribers to be made at one and the same time, and for one person to witness the whole of the signatures. Of course, if the signatures are appended at different times each signature must be witnessed and the witnesses must be independent of the signatories; that is, one subscriber cannot witness the signature of another subscriber.

Any person may be a subscriber to the memorandum of association, e.g. an alien, a bankrupt, or an infant. There is, however, some doubt as to this last point

(*In re Nassau Phosphate Co.* (1876); *In re Laxon & Co.* (1892)). It is probable that registration might be refused if it appeared that the memorandum had not been signed by seven (or two) adults.

Each person who signs the memorandum is bound to pay his subscription. This was clearly established in *Lord Lurgan's Case* (1902). There a subscriber signed the memorandum of association of a company before its incorporation for 250 shares. After its incorporation he sought to avoid his liability on the shares on the ground that he had been induced to sign by the misrepresentation of a promoter of the company. It was held that, even assuming the misrepresentation had been made and acted upon, there was no escape from liability on the 250 shares on two grounds, (1) because the company before it came into existence could not appoint an agent, and was therefore not liable for the acts of the promoter, and (2) because, by signing the memorandum, the subscriber became bound on the registration of the company not only as between himself and the company, but also as between himself and the other persons who should become members.

Liabilities of
subscribers

The character of English companies is anomalous, as, if domiciled in this country, they are considered English even though the shareholders and directors are foreigners. This matter has been more particularly brought into prominence in connection with British ships. Over and over again it has been shown that ships were owned by companies composed of persons of foreign nationality, yet registered in England so as to claim the privileges of being recognised as owners of British ships. In deciding whether a ship is or is not British, it seems to be clearly established however that the court is entitled to go behind the register and to inquire as to the nationality of the owners (*The Polzeath* (1916); *The St. Tudno* (1916)).

Nationality of
companies

Articles of Association. These are the rules and regulations which specify the mode of conducting the business of a joint-stock company, the number and share qualification of the directors, and generally the

whole internal organisation of the company. They correspond, in fact, to articles of partnership.

Articles of association are supplementary to the memorandum of association, and every person who has any dealings with a company, whether as a member, a creditor, or otherwise, is presumed to have constructive notice of the contents of both the memorandum and the articles, so far as regards the external position of the company (*Ernest v. Nicholls* (1857)). Where, however, as in the case of *Royal British Bank v. Turquand* (1856), the directors of a company have power to borrow, the lenders of the money have a right to presume that the company which put forward their directors as authorised to borrow have taken every step requisite to empower them to do so. Similarly where a manager of a company issued a guarantee, which was an act that the board of directors had power under the articles to delegate to him, the court held that there was no obligation on the person to whom it was issued to inquire whether the power had been so delegated. He was entitled to assume that it had (*British Thomson-Houston Co. v. Federated European Bank, Ltd.* (1932)).

Companies which are limited by guarantee, and unlimited companies, must register articles of association along with the memorandum. But a company limited by shares may either register any special articles of association drawn up on its behalf, or rely upon Table A of the First Schedule of the Companies Act, 1929. This table is a model set of articles—one hundred and seven in number—sanctioned and recommended by the legislature. It is very rare, indeed, that a company which conducts a business of any dimensions relies upon it. But if it is relied upon, the memorandum of association, when taken for registration, is endorsed "registered without articles of association," and Table A applies. Small companies sometimes adopt a portion of Table A, as far as is suitable for their business, and register articles to that effect.

The articles must be drawn in separate paragraphs,

Table A

Contents of
articles

numbered consecutively. Their number and contents will vary according to the nature of the business of the company. It is the ordinary course for clauses to be inserted which regulate the general business of the company in reference to the division of its capital, the issue of shares, forfeiture for non-payment, increase of capital, etc., borrowing powers, general meetings, voting, directors and their qualifications, powers, duties, etc., dividends, accounts, audits, notices, arbitration clause, and the distribution of the assets on the winding up of the company.

The articles must be printed, must bear a 10s. deed stamp, and must be signed by the subscribers of the memorandum. The signature of each subscriber must be attested by some person other than a subscriber. Each member of the company is entitled to a copy of the memorandum and articles upon payment of 1s.

Stamp and
printing

The articles of association are controlled by the memorandum, which is the instrument indicating the purposes for which the company is established. "The memorandum is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit" (*Ashbury Railway Carriage Co. v. Riche* (1875)). Hence, if the sphere of action of the company is exceeded by the terms of the articles, the latter will be inoperative to the extent of the excess, and nothing that is done under the inoperative part of the articles is capable of ratification.

Construction
of articles

The articles may be altered by special resolution, and a company cannot contract itself out of its power of making such alteration. The alteration, however, must not be of such a character as to benefit the majority and oppress the minority of the shareholders (*Brown v. British Abrasive Wheel Co.* (1919)), unless it is very clear that upon the whole the change is made *bona fide* for the benefit of the company (*Sidebottom v. Kershaw, Leese, & Co., Ltd.* (1920)). It is not an objection to such an alteration that the effect may be retrospective. Thus, in *Allen v. Gold Reefs of West Africa*,

Alteration
of articles

Limited (1900), the original articles of a company provided that the company should have a lien upon all shares "not being fully paid held by such member." The vendor of the company had been paid in fully-paid shares, but a nominee of the vendor, to whom some of the vendor's shares had been allotted, owed money to the company. By special resolution the company altered their articles of association by striking out the words "not being fully paid." The effect of the alteration was to charge the fully paid-up shares of the nominee with the payment of his debt. It was held that this could be done.

Registration
of articles

The articles of association are delivered to the Registrar of Companies at the same time as the memorandum of association, and he registers both upon payment of the fees required. Any special resolution altering them must be printed and annexed to the original articles and to all subsequent copies issued, and a copy must be forwarded to the Registrar within fifteen days of the passing of the same. A fee of 5s. is payable at the time of registering the resolution.

Registration of Company. When the memorandum of association has been signed it must be stamped. In addition to the ordinary deed stamp of 10s.—which is required by both the memorandum and the articles—registration stamps are necessary according to the scale set out in the Tenth Schedule to the Act.

Documents to
be deposited

The Companies Act, 1929, sets out fully the various documents which must be deposited with the Registrar of Companies; but these are connected with the practical part of the formation of companies, a subject much too wide for discussion in the present volume. The principal of the documents, however, may be mentioned. They are: a return of the directors, a form of consent on the part of the directors to act as such, a statement as to the exact situation of the registered office of the company, and a declaration that all the requirements of the Act as to registration and all matters precedent and incidental thereto have been complied with. Each of these documents must bear a five-shilling stamp.

Thereupon a certificate of incorporation is issued by the Registrar. This certificate is conclusive evidence that everything is in order. The conclusiveness of the certificate of incorporation upon the legality of the objects of a company was fully considered in the case of *Bowman v. Secular Society, Ltd.* (1917). The members then become a corporation, and the incorporation takes effect from the date of the certificate. If the company is a private one it is at liberty to commence business at once, but a public company cannot as yet proceed further than the issue of a prospectus inviting the public to apply for shares.

Certificate of
incorporation

The Prospectus. This is the document put forward by the persons interested in a company to induce other persons to take shares or otherwise assist the company with money. By sect. 380 of the Companies Act, 1929, the expression "prospectus" includes any notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company.

By sect. 38, any document containing an offer of shares or debentures for sale is deemed to be a prospectus, and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses apply accordingly.

Definition of
prospectus

The prospectus is generally issued immediately after the registration of the company. It must be dated, and the date is deemed the date of its publication. A copy must be signed by every person named in it as a director or a proposed director (or by his authorised agent), and filed with the Registrar at or before the date of publication.

Must be dated

As the persons who issue the prospectus are liable in damages to any one damnified by any false representation contained therein, the greatest care is necessary in its preparation. The obligation of those responsible for its issue and publication was thus laid down, in what has been called "the golden rule as to framing prospectuses," by Vice-Chancellor Kindersley in *New*

Liability of
issuers

Brunswick Railway Co. v. Muggeridge (1861). "Those," said he, "who issue a prospectus . . . are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

If the tendency of the prospectus as a whole is to deceive there is no need, in order to claim rescission of a contract, to take shares to show that specific statements are untrue (**Aarons Reef v. Twiss** (1896)).

Contents of
the
prospectus

By sect. 35 and the Fourth Schedule of the Act, every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the following matters—

1. Contents of
memorandum

(1) Except where the prospectus is published as a newspaper advertisement, the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively.

2. Number of
founders, etc.,
shares

(2) The number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

3. Number of
director's
qualification
shares

(3) The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.

4. Names,
descriptions,
and addresses
of directors
5. Minimum
subscription

(4) The names, descriptions, and addresses of the directors or proposed directors.

(5) Where shares are offered to the public for subscription, particulars as to—

(i) The minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters—

(a) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(b) Any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company ;

(c) The repayment of any moneys borrowed by the company in respect of any of the foregoing matters ;

(d) Working capital ; and

(ii) The amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

(6) The amount payable on application and allotment on each share, and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

6 Amount payable on application and allotment

(7) The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

7 Shares issued otherwise than for cash

(8) The names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.

8 Names and addresses of vendors of property to the company

9. Amount paid as purchase money for property and goodwill

(9) The amount, if any, paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount, if any, payable for goodwill.

10. Amount of commission for subscribing or procuring subscriptions for shares

(10) The amount, if any, paid within the two preceding years, or payable, as commission (but not including commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission.

11. Amount of preliminary expenses

(11) The amount or estimated amount of preliminary expenses.

12. Amount paid to promoters

(12) The amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment.

13. Dates of and parties to contracts

(13) The dates of and parties to every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected

14. Names and addresses of auditors

(14) The names and addresses of the auditors, if any, of the company.

15. Interest of directors

(15) Full particulars of the nature and extent of the interest, if any, of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

16. Voting rights of members

(16) If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, the

right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.

(17) In the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the length of time during which the business of the company or the business to be acquired, as the case may be, has been carried on.

17 Length of time business carried on

The matters numbered (1), (3), (4), and (5) do not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

In addition, the prospectus must set out the following reports—

(1) A report by the auditors of the company with respect to the profits of the company in respect of each of the three financial years immediately preceding the issue of the prospectus, and with respect to the rates of the dividends, if any, paid by the company in respect of each class of shares in the company in respect of each of the said three years, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years, and, if no accounts have been made up in respect of any part of the period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

1 Auditors' report as to profits

(2) If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by accountants who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus.

2 Accountants' report as to profits of business to be purchased

A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract,

Illegality of waiver clause

document, or matter not specifically referred to in the prospectus, is void.

False
representation
in prospectus

Rescission of
contract

Damages
against
persons
responsible

Where a person has been induced to take shares in a company on the faith of any false representations contained in a prospectus, there is, under the general law, a twofold remedy open to him, (1) against the company, and (2) against the persons who are responsible for the issue and publication of the prospectus. The remedy against the company is for a rescission of the contract to take shares. This can be obtained only if the applicant proves that the prospectus misrepresented or failed to disclose some material fact, and that such misrepresentation or concealment led to the formation of the contract (**New Brunswick Railway Co. v. Muggeridge** (1860)). The application must be made very promptly or the right to relief will be forfeited; and if the company is being wound up no application for rescission will be entertained, as the rights of the whole body of the company's creditors have intervened (*Oakes v. Turquand* (1867)). The remedy against the persons who are responsible for and have issued the prospectus is an action for damages. At common law the action was for deceit. This action, however, being considered inadequate, owing to the decision in *Derry v. Peek* (1889), the Directors' Liability Act, 1890 (53 & 54 Vict., c. 64), was passed (now sect. 37 of the Act of 1929), whereby the burden of proof is upon the directors or other persons responsible for the issue of a prospectus, to show that they have acted honestly in making the statements contained in the prospectus, whereas it was formerly upon the subscriber to prove that the statements were made either dishonestly or recklessly, the directors, etc., not caring whether they were true or false. It was held in *Adams v. Thrift* (1915), that the uncorroborated statements of a vendor-promoter of a company do not themselves afford a reasonable ground for belief that the statements are true. See further as to the liability of directors for false statements in a prospectus, page 194, *post*.

In *Frankenburg v. Great Horseless Carriage Co.* (1900),

it was held that an action against a company for rescission and against directors for deceit may be combined in one writ.

The measure of damages under sect. 37 of the Companies Act, 1929, for untrue statements in a prospectus is the same as in the common law action of deceit (*Clark v. Urquhart, Strachey v. Urquhart* (1930)).

The same rules apply in general to prospectuses offering debentures, debenture stock, or other securities for subscription as to those which offer shares of a company to the public.

As it is extremely easy to obtain copies of prospectuses, the reader is strongly advised to procure a few, and to study carefully their contents with the assistance of Schedule IV of the Act of 1929.

Statement in Lieu of Prospectus. A public company which does not issue a prospectus on or with reference to its formation, or which has issued a prospectus but has not allotted any of the shares offered to the public for subscription must not allot either shares or debentures unless at least three days before the first allotment a statement in lieu of prospectus, containing most of the matters which a prospectus is required to contain, has been delivered to the Registrar.

Underwriting. Underwriting is a species of insurance, or rather it is the application of the principle of insurance to company formation. Its object is to guard against the risks that shares, debentures, or debenture stock offered for public subscription may not be taken up. This is effected by a certain number of people, who are called "underwriters," guaranteeing that they themselves will subscribe the whole or a portion of the shares, debentures, or debenture stock if the public fail to do so. Since the introduction of the provision as to "minimum subscription" before going to allotment (page 199, *post*), it is clear that many projected enterprises must be ruined unless a considerable portion of the capital is practically secured before the concern is offered to the public.

"Generally the underwriting is done by a number of

How
underwriting
effected

The
underwriting
agreement

persons, but at times the whole of an issue is underwritten by a company, or by one or two persons. The *modus operandi* is as follows: The underwriter writes a letter addressed to the founder or promoter, or to the company, agreeing to underwrite a specified amount of what is to be offered, upon the footing that he is only to be bound to take up his rateable proportion of what the public do not take up; and that in any event he is to be paid a commission, either in cash or paid-up shares, or in some other shape. Such a letter is generally expressed in the form of an agreement, 'I agree to underwrite,' etc., but in effect it operates only as an offer; and, to become binding—to be converted into a contract—it must be accepted by the other party, and notice of such acceptance given to the underwriter (*In re Consort Deep, etc., Co.* (1897)). The acceptance may be in writing or oral (*In re North Charterland Co.* (1896)), and it is *prima facie* no objection that the notice of acceptance is not given until after the list has closed (*In re Hemp Cordage, etc., Co.* (1896)), for the court is not disposed to import into underwriting contracts implied conditions in derogation of the express terms of the contract (*In re Crown Lease Proprietary Co.* (1896)). Where the agreement is to underwrite on the terms of a specified prospectus, a serious variation of the terms of the prospectus may vitiate the contract, even though the agreement expressly allows for variations in the prospectus (*In re Warner International Co., Ltd.* (1914)). The underwriting letter usually provides that if the underwriter makes default in applying, the other party to the underwriting agreement may apply for the shares on his behalf. This authority, if properly framed, is effective and irrevocable where there is a complete contract, as above; for, in such cases, it is one of the terms of the contract that the authority shall subsist, and it is not open to one party to a contract by any notice to the other to revoke what is a term of the contract (*Carter v. White* (1884); *In re Hannan's Empress Mining Co., Carmichael's Case* (1896); *Pole's Case* (1920))." (*Palmer's Company Law*, 15th Edition, p. 359.)

An underwriting agreement may be made subject to any conditions precedent, and until these conditions are performed the underwriter is in no way bound (*Ormerod's Case* (1894)). Also an agreement to take shares must not be confounded with an agreement to place shares. The latter is not an underwriting agreement.

By sect. 43 of the Act of 1929, it is lawful for a company to pay commission in respect of an underwriting agreement, under the following conditions—

Commission
for
underwriting

(1) The payment must be authorised by the Articles.

(2) The commission proposed must not be in excess of 10 per cent of the price at which the shares are issued or the rate authorised by the articles of association, whichever is the less.

(3) The agreement to pay and the rate to be paid must be disclosed in the prospectus, statement in lieu of prospectus, or circular in which the shares are offered.

A company may lawfully issue shares at a discount, provided the shares so issued are of a class that has been previously issued and the issue is authorised by resolution passed in general meeting of the company and sanctioned by the court. The resolution must specify the maximum rate of discount and the shares must be issued within a month after the sanction of the court is obtained, but no issue at a discount can take place unless at least a year has elapsed since the company became entitled to commence business.

Issue of
shares at a
discount

If an underwriter takes up the shares of a company on the faith of a prospectus which contains misrepresentations, he has the same right to repudiate his shares as any other subscriber.

Rights of
underwriter
in respect of
misrepresenta-
tions in
prospectus

An agreement to underwrite capital, like any other agreement, requires a 6d. stamp. If under seal a 10s. deed stamp is necessary. There is no need for an additional power of attorney stamp, because the contract contains an authority to apply for shares on behalf of the underwriter.

Stamps

MANAGEMENT

Directors. The directors of a company are those persons who are chosen by the shareholders to conduct

and manage its business. The whole of the directors constitute the Board of Directors.

Position of
directors.

The question has been discussed in a large number of cases whether directors are trustees or agents of the company. In various respects they occupy both positions. They are especially trustees of the powers committed to them, and of moneys which come into their hands, and they are, in addition, the general agents of the company. They are not, however, trustees for the individual shareholders, and may purchase their shares without disclosing negotiations for the sale of the undertaking (*Percival v. Wright* (1902)).

Powers of
directors

The powers which directors can exercise are conferred upon them by the memorandum and articles of association. All persons, third parties as well as members of the company, having dealings with the company, are presumed to have full knowledge of the contents of these two documents, since they are both open to public inspection. Such persons, therefore, must know the extent of the powers of the directors, and be acquainted with any restrictions placed upon them.

It may be stated here, although this is travelling somewhat beyond the scope of this chapter as indicated above, that in the particulars which have to be returned each year to the Registrar of Companies, it is now necessary to state the full names and addresses of the directors, and to supply particulars as to their change of name and nationality (if any) similar to those required in the case of partners by reason of the Registration of Business Names Act, 1916. (See page 144, *ante*.)

The number, powers, and method of election of the directors are provided for by the articles of association. If no directors are named therein, the subscribers of the memorandum of association are the directors until others are appointed.

Remuneration

The remuneration of the directors is similarly provided for—sometimes to be paid out of the profits of the company, sometimes out of the company's funds.

There is no legal enactment requiring directors to be

possessed of any share or shares in their company, but a share qualification is almost invariably provided for in the articles of association, since the London Stock Exchange requires it as a condition precedent to granting a quotation for the shares. If the articles require a director to hold a specified share qualification it is his duty to obtain his qualification within two months after his appointment, or such shorter time as the articles may fix. The bearer of a share warrant, it should be observed, is not considered to be the holder of the shares specified in the warrant for the purpose of complying with a requirement to take qualification shares (sect. 140).

Qualification
shares

Further, before a person is appointed by the articles as a director of a public company having a share capital, he must deliver to the Registrar a consent in writing to act as such director and either—

Consent to
act

(1) Sign the memorandum for a number of shares not less than his qualification (if any); or

(2) Take from the company and pay or agree to pay for his qualification shares (if any); or

(3) Sign and deliver to the Registrar for registration an undertaking in writing to take from the company and pay for his qualification shares (if any); or

(4) Make and deliver to the Registrar for registration a statutory declaration to the effect that a number of shares, not less than his qualification (if any) are registered in his name.

A director who is appointed for a limited time cannot be removed from his position until that time has elapsed, unless there is a special provision in the articles of association to that effect. Similarly, he is unable to resign his office. By sect. 141 of the Act, on failure to obtain, or on ceasing to hold, his qualification shares, the office of a director is vacated.

Removal from
office and
disqualifica-
tions

If any person, being an undischarged bankrupt, acts as director of a company, except by leave of the court by which he was adjudged bankrupt, he is liable to imprisonment (sect. 142).

The directors are personally liable for all acts which

Liabilities of
directors

are *ultra vires* the company, and they may be responsible for acts which are *intra vires* the company and yet *ultra vires* the directors. They must, like agents, never place themselves in a position where their duties and their interests are in conflict, otherwise they may be called upon to refund any moneys expended by them, even though the expenditure may appear to be for the benefit of the company (*Costa Rica Railway Co. v. Forwood* (1901)). Their duties cannot be delegated except by express authority, or in the same manner that the duty of an agent may be delegated. Under the provisions of the Companies Act, 1929, the court has very wide powers in relation to offences of directors antecedent to and in the course of winding-up. In particular it may assess damages against a director where he has been guilty of breach of trust against the company, and may direct the liquidator to prosecute directors who are criminally liable in respect of offences against the company.

Issue of
fraudulent
prospectus

If the directors or any of them have been parties to the issue and publication of a fraudulent prospectus, any person damnified may bring an action against them for the loss which has been sustained. The action was formerly one of deceit, but now the law as to directors and others responsible for the issue and publication of a prospectus is set out in sect. 37 of the Companies Act, 1929, replacing and re-enacting generally the provisions of the Directors' Liability Act, 1890. The defences to the action are three in number, but the burden of proof lies on the defendants, whereas in an action for deceit the burden of proof is upon the plaintiff. The defences are—

Defences to
action

(1) That the directors, etc., believed that the statements contained in the prospectus were true, or had reasonable grounds for doing so, and that they retained the belief up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be.

(2) That the statements set forth were made from the reports or valuations of duly qualified and competent persons, e.g. engineers, valuers, accountants, or

other experts, or that they were copied from some official document.

(3) Any director may show that he withdrew his consent to the prospectus, and gave public notice of the fact.

It is, further, a defence if he can prove that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue he immediately gave reasonable public notice that it was issued without his knowledge or consent.

It is not necessary that a director should play the part of an expert by examining facts and figures, but if he signs a prospectus relying on the belief of other directors he cannot escape liability (*Adams v. Thrift* (1915)).

By sects. 146 and 147 of the Companies Act, 1929, a limited company may, in certain circumstances, have directors with unlimited liability.

Accounts. Under sect. 122 of the Act, every company must keep proper books of account with respect to—

(contents of
books of
account)

(1) Sums received and expended by the company and the matters in respect of which the receipt and expenditure takes place.

(2) Sales and purchases of goods by the company.

(3) Assets and liabilities of the company.

The directors of every company have to lay before the company in general meeting, once at least in every calendar year, a profit and loss account, or, in the case of a company not trading for profit, an income and expenditure account. Similarly, a balance sheet, containing various matters specified in the Act, has to be laid before the company, and attached to the balance sheet should be a report by the directors as to the state of the company's affairs, the amount they recommend should be paid as dividend, and the amount to be carried to reserve.

Profit and loss
account

Balance
sheet

Auditors. These are persons who are employed for the purpose of verifying the accounts of a company. In the main their duties are similar to those of agents. They must do their work with proper care and skill, and if damage results from their negligence, they are

liable to an action at the instance of the person who has been damnified.

Position of
auditor

The position of an auditor was laid down with great clearness by Lord Lindley (then Lindley, L.J.) in the case of *In re London & General Bank* (1895): "His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question: How is he to ascertain that position? The answer is: By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance sheet showing that position according to the books, and to certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did he would be responsible for an error on his part, even if he were himself without any want of reasonable care on his part—say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest—i.e. he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that which he certifies is true. What is reasonable care in any particular case must depend upon the circumstances

of that case. Where there is nothing to excite suspicion, very little inquiry will be reasonably sufficient, and, in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. But an auditor is not bound to be suspicious as distinguished from reasonably careful."

In accordance with these principles it was held, in the case of *In re Kingston Cotton Mills Co. (No. 2)* (1896) that auditors who, without any ground for suspicion, had accepted and acted upon the certificate of the manager of the company as to the amount and value of the stock of the company (the manager being an old and trusted servant of the company, of high character and competence, and trusted by all who knew him), were under no liability for the balance sheet drawn up, and upon which the directors declared a dividend, though the valuation was false to the knowledge of the manager.

The first auditors of a company may be appointed by the directors at any time before the first annual general meeting, and they will hold office until that meeting. Then at the annual general meeting and at each annual general meeting thereafter, the company must appoint an auditor or auditors to hold office until the next annual general meeting. An auditor may be appointed by the Board of Trade in default of appointment by the company. The directors may fill any casual vacancy in the office of auditor.

Appointment

The remuneration of the auditors of a company is fixed by the company in general meeting, except that the remuneration of an auditor appointed by the directors before the first annual general meeting or to fill a casual vacancy may be fixed by the directors.

Remuneration

None of the following persons are qualified for appointment as auditor of a company—

Disqualifications

- (1) A director or officer of the company ;
- (2) Except where the company is a private company, a person who is a partner of or in the employment of an officer of the company ;
- (3) A body corporate.

A body corporate may, however, act as auditor of a company if acting under an appointment made before 3rd August, 1928.

Duties

The auditors must make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office ; the report must state—

- (1) Whether or not they have obtained all the information and explanations they have required ; and
- (2) Whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

Every auditor of a company has a right of access at all times to the books and accounts and vouchers of the company, and is entitled to require such information as may be necessary for the performance of his duties.

Moreover, the auditors of a company are entitled to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and to make any statement or explanation they desire with respect to the accounts.

The auditors' report must be attached to the balance sheet and read before the company in general meeting, and must also be open to inspection by any member. If any copy of a balance sheet is issued, circulated, or published without having a copy of the auditors' report attached thereto, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, is, on conviction, liable to a fine not exceeding £50.

Allotment of Shares. This signifies the distribution

of the shares, etc., of a joint-stock company in response to applications for them, or in pursuance of contracts already entered into with regard to them.

Prior to 1901 nothing was required in the allotment of shares beyond the elements which go to the formation of a simple contract—application, allotment, and communication to the applicant within a reasonable time. The result was that many companies went to allotment when the applications for shares were such as altogether to exclude the possibility of the company being able to conduct any business at all. The present restrictions in connection with this matter are contained in sects. 39 and 41 of the Act of 1929. By sect. 39, no allotment can be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum subscription has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company.

Restrictions
on allotment

Minimum
subscription

The minimum subscription is the minimum amount which, in the opinion of the directors, must be raised by the issue of share capital in order to provide for—

(1) The purchase price of any property purchased or to be purchased, which is to be defrayed in whole or in part out of the proceeds of the issue;

(2) Any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure, subscriptions for any shares in the company;

(3) The repayment of any moneys borrowed by the company in respect of any of the foregoing matters; and

(4) Working capital.

A sum is deemed to have been paid to and received by the company if a cheque for that sum has been received in good faith by the company, and the directors of the company have no reason for suspecting that the cheque will not be paid.

The amount fixed is to be reckoned exclusively of any amount payable otherwise than in cash, and on

application there must be paid a sum equal to five per cent at least of the nominal amount of each share.

If the foregoing conditions have not been complied with on the expiration of forty days after the first issue of the prospectus, all the moneys received from applicants for shares must be repaid to them without interest; and if repayment is not made within forty-eight days after the issue of the prospectus the directors of the company will be jointly and severally liable to repay the moneys with interest at the rate of five per cent per annum.

Return of
allotments

Within one month of making any allotment, a company has to deliver to the Registrar of Companies a return of the allotments stating (*inter alia*) the number and nominal amount of the shares, as well as the names and descriptions of the allottees and the amount paid or due and payable on each share.

Liability of
directors

The directors are personally liable for any losses arising out of irregular allotments, and are further liable to a fine of £50 if they neglect to make a full return of the allotments to the Registrar of Companies within a month of the allotment of the shares.

Application—
offer and
acceptance

An application for shares is an offer to contract, and may therefore be withdrawn at any time before the allotment is made and communicated to the applicant. The posting of the letter of allotment is an acceptance of the offer to take shares, and a withdrawal of an application which arrives after the posting of the letter of allotment, even though written and sent before the posting of the acceptance, will come too late. The posting of the letter of allotment binds the applicant, and it is no answer in law to the contract that the applicant never received the letter. (See page 21, *ante*.)

Letter of
allotment

The letter of allotment informs the applicant of the number of the shares which have been allotted to him. Where the nominal amount of the allotment is less than £5, a stamp duty of one penny is imposed; for larger amounts the duty is sixpence.

Sect. 41 deals with the effect of irregular allotments

and provides that an allotment in contravention of the above provisions is voidable at the instance of the applicant within one month after the holding of the statutory meeting. Where there is no statutory meeting, or where the allotment is after the date of the statutory meeting, it is voidable within one month after the date of the allotment.

Irregular allotments

It is unlawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public (sect. 356). House, however, does not include an office used for business purposes.

Share hawking

The Act further contains restrictions on offers in writing to sell shares to the public unless permission to deal in the shares has been granted by a recognised stock exchange in Great Britain, or unless the shares have been allotted with a view to their being offered for sale to the public, or unless the offer was made to persons with whom the offeror was in the habit of doing business in the purchase or sale of shares.

Share Certificates. A person who applies for shares in a company becomes liable to pay for the same as soon as the fact of the allotment has been communicated to him, and under sect. 67 of the Act of 1929 he is entitled to receive a share certificate within two months after allotment, which authenticates the fact that the person named therein is the registered holder of so many shares in the company, of certain numbers. The certificate is generally impressed with the seal of the company.

The form of a share certificate is commonly as follows—

Form

"THE A B COMPANY, LIMITED

"This is to certify that C D is a registered holder of m shares of £n each, numbered p to q inclusive, in the above-named company, and that the sum of £x has been paid up on each of the said shares. Given under the common seal of the said company, this 1st day of June, 19.."

Evidence of
title

A share certificate is *prima facie* evidence of the title of a member to the share or stock comprised therein, and its issue is intended to facilitate dealings in the open market. It is, in fact, the proper, and the only, documentary evidence in the possession of a shareholder. It is necessary, therefore, that the directors of a company should exercise extreme care and caution in the issue of certificates, for if loss is incurred through any negligence or inadvertence, the company will, as a rule, be estopped from denying the accuracy of the statements set forth in them to a person who has acted *bona fide* and in reliance upon such statements (*In re Bahia & San Francisco Railway Co.* (1868); *Balkis Consolidated Co. v. Tomkinson* (1893); *Bloomenthal v. Ford* (1897); *Ruben v. Great Fingall Consolidated* (1906)).

Stamps

A share certificate requires no stamp, although it is a document under the seal of the company. But a scrip certificate or other document entitling any person to become a proprietor of any share of a company needs a twopenny impressed stamp.

Lost
certificate

If a certificate is lost, it is generally provided by the articles of association that a new certificate shall be granted on a proper indemnity being given by the shareholder.

Deposit of
certificate as
security

A valid equitable mortgage of shares or stock may be effected by the deposit of the share certificates relating thereto.

Register of Members. Every joint-stock company is bound to keep a register or list of its members for the time being, their names, addresses, and occupations, and of the shares which they respectively hold. The register must be open to inspection during business hours, gratis to shareholders, and on payment of a sum not exceeding one shilling to other people. The register may be closed for any period not exceeding thirty days in each year. Also every company which has its capital divided into shares must annually forward a list of its members to the Registrar of Companies. No notice of any trust is to be entered in the register.

Every company having more than fifty members

must, unless the register is in such form as to constitute in itself an index, keep an index of the names of the members of the company.

Index of
members

In cases of the improper entry or omission of names from the register the injured party may apply to the court for a rectification of the same, by striking out or placing therein the name of the member who has complained of the improper entry or omission.

Mistakes in
register

Capital. A word or two may here be said as to the capital of the company. It is the sum subscribed by the shareholders for the purpose of being applied to the establishment or the extension of the company's business. The proposed sum named in the memorandum of association of the company is called the "nominal" capital. When the whole of the capital is not taken up, that which is represented by the number of shares held by the members is called its "subscribed" or "issued" capital. That portion of the issued capital which is actually paid by the members of the company is called the "paid-up" capital, the remaining portion, for which the shareholders are liable, being known as the "unpaid" or "uncalled" capital.

"Nominal,"
"subscribed,"
"paid-up," &
"unpaid" cap-
ital

Thus, a company may issue a prospectus and fix the capital of the business at £100,000. This amount is the "nominal" capital of the company. If the shares are divided, say, into 100,000 of £1 each, and no more than 75,000 are issued, £75,000 will be the "subscribed" or "issued" capital. Again, it may be sufficient to call upon each shareholder to pay no more than one-half of the nominal amount of the shares held by him. Then £37,500 will represent the amount of the "paid-up" capital, and the remaining £37,500 will be the "unpaid" or "uncalled" capital of the business.

A company may increase or reduce its capital, but no reduction is possible except with the confirmation of the court. If a reduction is made, the words "and reduced" may be added after the word "limited" in the company's name for such time as the court directs.

Increase and
reduction of
capital

It must not be forgotten that a company cannot, in any circumstances, purchase its own shares and attempt

Purchase of
own shares

to reduce its capital in this way. There is, however, nothing to prevent a transfer of shares in a company to trustees for the company where the transfer is neither for money nor for money's worth, and where no reduction in the capital of the company is affected. Thus, in *Kirby v. Wilkins* (1929), where a partnership business was sold to a company and shares were allotted to the partners in return, and it was subsequently discovered that owing to a mistake in valuation the partners had been overpaid, the court held that there was nothing to prevent the partners from voluntarily transferring shares to the chairman of the company upon trust to use or sell them for the benefit of the company.

Common Seal. It is almost unnecessary to remind the reader that, for reasons which have been already explained in the first part of this volume, every company must possess a common seal. The seal must have the name of the company engraved upon it in legible characters. It must be used for the authentication of all important documents.

In connection with this matter it must also be stated that the full name of every limited company must be legibly painted or affixed to the outside of every office or place of business where the company conducts its transactions, and that the name must be mentioned in all notices, advertisements, official publications, bills of exchange, orders for goods, receipts, etc., connected with the business. Non-compliance with these provisions renders the company liable to varying penalties.

Official seal
for use
abroad

For those companies which conduct business abroad an official seal may be provided, if authorised by the articles, for use outside this country. Such seal is a facsimile of the common seal but has on it the name of the country in which it is to be used.

Transfer of Shares. Unless there is a special restriction or limitation by the articles of association, the holder of shares in a company, whether the same were originally allotted to him, or whether he has acquired them from a previous holder, is entitled to transfer them to whomsoever he pleases. The transfer is effected

either by deed or by an instrument in writing, signed by the transferor and the transferee. The transfer, sometimes accompanied with the certificate, is sent to the company's office for registration, and the name of the transferee is entered in the books of the company as the holder of the shares. The transferee then becomes a member of the company. Within two months after the date on which the transfer is lodged with the company it is the duty of the company to have the share certificates ready for delivery. On the death of a shareholder the right in his shares passes to his personal representative—executor or administrator—and in bankruptcy the trustee steps into the place of the bankrupt. The personal representative, or the trustee in bankruptcy, may be registered as a member, or may transfer the shares which have fallen to him to another person without being himself registered.

Death or
bankruptcy
of shareholder

Difficulties sometimes arise in the cases of forged transfers. A forgery cannot destroy the title of the true holder of shares, and if his name is removed from the register by reason of the forgery it must be restored (*Barton v. London & North Western Railway Co.* (1890)). But the company itself may be liable to a transferee if it has issued a certificate on the faith of the forged transfer, and the transferee has purchased on the faith of the certificate (*Bloomenthal v. Ford* (1897)). The certificate acts as an estoppel. But if the transferee has acted solely upon the forged transfer and not upon any certificate the case is different. In order to protect themselves from liability many companies refuse to certify a transfer of shares until they have communicated with the holder. By the Forged Transfer Acts, 1891 and 1892, joint-stock companies, local authorities, incorporated friendly societies, and building and other provident societies are empowered to create a fund for the compensation of transferees under forged transfers, whether they are legally liable or not to indemnify such transferees for losses sustained.

Forged
transfers

Share certificates are sometimes deposited as a security for a loan, together with a blank transfer, that

Blank
transfer

is, a transfer executed by the borrower only, the name of the transferee not being stated. This gives to the lender an implied authority to fill in the name of the purchaser of the shares if the borrower fails to repay the money. But this mode of transfer is effectual only where the articles of the company permit of the transfer of shares by an instrument in writing simply. If the transfer must, under the articles, be made by deed, a blank transfer will be of no value, since the instrument itself is not a deed, being faulty in the fact that one of the essentials of a deed, namely, the name of the transferee, is not inserted at the time of its execution (*Powell v. London & Provincial Bank* (1893)).

Contract to
sell shares

Since shares are not "goods, wares, or merchandise," a contract for their sale does not fall within sect. 4 of the Sale of Goods Act, 1893. Therefore the contract need not be evidenced by writing. If the contract is not to be performed within a year the case is different. Mention has already been made of the exception established by Leeman's Act, 1867 (see page 67, *ante*).

Liability of Shareholders. While the shareholder has the same right to participate in the profits of a business that is enjoyed by a partner, unless there is some agreement to the contrary, proportionately to the amount of the capital which he has invested, and to take such part in the affairs of the company as is allowed by the articles of association, his liability is limited to the amount unpaid on the shares held by him. If he has paid up the whole nominal amount of his shares, he is absolutely free from any further liability. If he has paid only a certain proportion of the nominal value, he is responsible for the portion which remains unpaid. Should the remaining portion, or any part of it, be required, a demand is made upon the shareholder by what is termed a "call."

Calls on
shares

If the prospectus does not provide for the subscription of the whole of the capital of the company within a certain time after its formation, the articles of association must contain a clause or clauses dealing with the

manner in which the directors may require the shareholders to pay the calls. A call must be made in strict accordance with the articles, as any irregularity will entitle a shareholder to resist payment (*In re Cawley & Co.* (1889)). Thus, it must be made by duly appointed and duly qualified directors, and the proper length of notice must be given. Again, a call must be regular and *bona fide*, and made in the interest of the company. If the power is exercised wrongfully for the directors' own ends, or for other indirect purposes, there is an abuse of authority, and a shareholder may restrain the call by injunction. In order to succeed, however, a very strong case must be made out, as the court is not too eager to interfere with the discretion of the directors in the matter of calls.

There is generally a clause in the articles which provides for the forfeiture of the shares in respect of which default has been made in the payment of a call. It is an abuse of their power for directors to make a call with the object of enabling a shareholder to escape his responsibility by forfeiting the shares which he holds (*Spackman v. Evans* (1868)). Partly-paid shares which have been forfeited can be sold by the company, with the benefit of the amount paid up before forfeiture.

Forfeiture of
shares

Payment of calls may be enforced by action, and it is a breach of trust on the part of directors if they do not take reasonable steps to obtain the money due. It is now the common practice to sue for the amount of the call on a specially endorsed writ, and to take proceedings under Order XIV.

Enforcement
of calls

The estate of a deceased member, so long as his name remains on the register, is liable for calls.

Deceased
member

Every call is in the nature of a specialty debt, and a company can sue upon it at any time within twenty years.

Call as
specialty

Sometimes a person who has paid but a fractional part of his shares will be able to escape liability altogether for the remaining part by transferring his shares to a third party more than a year before the call is

Liability after
transfer

made, since the liability of any past member is, in every case, determined within the period of one year from his ceasing to be such (Act of 1929, sect. 157). And the liability within the year, under such circumstances, arises only if the transferee is unable to satisfy the call when it is made, and the other existing shareholders fail to discharge in full the liabilities of the company.

But there is this qualification. It is a very common thing, when a company takes over a going concern, for the vendor to receive a number of paid-up shares as part of the consideration for the sale of the business. Although, therefore, nothing has been paid in cash for such shares, the holder is not liable thereon if the contract to take shares in part payment has been filed with the Registrar. Any such contract must be clearly set out in the prospectus.

Stock and Share Warrants. When the capital of a company has been fully paid up, its shares are frequently converted into stock. The main difference between shares and stock is this—shares must be transferred whole, stock can be split up into fractional amounts.

Shares and
stock
distinguished

Share warrants

A share warrant is an instrument authenticated by the seal of the company, which entitles the holder to the shares mentioned, and admits of transfer by mere delivery.

Preference Shares. The memorandum of association sometimes provides that certain holders of the shares of the company shall be entitled to a portion of the profits of the business before any payment is made to the holders of other shares. Shares to which a priority of enjoyment of profits is given are called "preference shares," to distinguish them from those which are "ordinary shares." Various classes of preference shares are created, their rank being settled according to circumstances and the time of their creation. Railway companies, especially, though these are companies formed by special Acts and not within the scope of this chapter, offer good examples of the numerous classes of preference shares. The priority may have reference

to the profits of each year separately, or the preference may be "cumulative," that is, a deficiency which occurs in any one year must be made up in any succeeding year before any payment whatever is made to any ordinary shareholder.

Cumulative
preference

Founders' Shares. These are shares granted to the originator of a company as a reward for services rendered in floating the concern, or to other persons, such as promoters and underwriters, who have interested themselves in procuring the necessary capital. They are generally few in number, though they may become of great value if the business turns out a success. The rights attached to the shares vary considerably, and are generally provided for in the memorandum or articles of association. By sect. 35 and Sched. 4 of the 1929 Act every prospectus issued by the company must state the number of founders' shares and the extent of the interest of the holders in the property and profits of the company.

Commencement of Business. For the sake of convenience the matters in the last few sections have been dealt with together, though not always in their proper place as regards the establishment and the working of the business of a company.

Prior to 1901, the possession of the certificate of the Registrar was sufficient to authorise a company to commence business, but now a public company, that is, one that applies to the public for subscriptions for its shares, may not exercise any of the ordinary powers of trading unless—

Authority to
commence

(a) The minimum subscription of shares payable entirely in cash has been allotted;

(b) Each director has paid all moneys which are due upon the shares which he holds proportionate to the amount paid on other shares; and

(c) The secretary or one of the directors has made a statutory declaration in the prescribed form to the effect that the aforesaid conditions have been complied with, and has delivered the same to the Registrar for registration. As soon as the statutory declaration has

been delivered, the Registrar gives a certificate, which is conclusive evidence that the company is entitled to commence business.

If a company commences business in breach of the foregoing provisions, every person responsible for the breach is liable to a fine of £50 a day for the period during which the business has been irregularly carried on.

Meetings. The management of the affairs of a company is in the hands of the directors. But, since the directors are nominated by the shareholders, and it is necessary that the shareholders should have a knowledge of the general state of affairs, meetings must be held. A general meeting of every company must be held once at least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting.

Annual
general
meeting

Every company which invites the public to subscribe for shares must hold its first meeting within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business. The matters which are to be submitted to the meeting are set forth in sect. 113 of the Act of 1929, to which reference should be made.

Extraordinary
general
meeting

At any time an extraordinary general meeting of the company may be convened on the requisition of the holders of not less than one-tenth of the issued capital of the company, upon which all calls or other sums then due have been paid.

General
meetings

At general meetings of the company it is usual to decide questions raised by a majority of the members, whether present in person or by proxy. (A "proxy" is a written nomination of a member to vote on behalf of an absent member.) A meeting of a company other than a meeting for the passing of a special resolution, may be called by seven days' notice in writing, unless the articles of the company provide otherwise. In certain cases, however, in contradistinction to the "ordinary" resolution, that is, a resolution decided by a bare majority, a "special," or an "extraordinary"

Special
resolution

resolution is required. A "special" resolution is one passed at a meeting of which 21 days' notice specifying the intention to propose the resolution has been given, and in which there is a majority of three-fourths of those voting for the resolution.

An "extraordinary" resolution is one passed by a three-fourths majority of those voting at a general meeting of which notice of the intention to propose the resolution has been duly given. Extraordinary
resolution

The proceedings of a company at its meetings must be duly recorded in a book kept for the purpose. These are called the "minutes." If signed by the chairman of the meeting they are receivable as evidence in legal proceedings. "Minutes"

Annual Returns. Every company having a share capital must once at least in every year make a return which is to be contained in a separate part of the register of members. A copy of the return must be forwarded to the Registrar of Companies.

The annual return must contain (*inter alia*) a list of the names of present and certain past members of the company, together with their addresses and occupations and the number of shares held by each existing member. In addition to this list, the return must contain a summary of the share capital of the company, showing how it is split up and giving details of calls on shares, etc.

Debentures. The most common way in which a company borrows money for extending its business or for other purposes, apart from increasing its capital, is by the issue of debentures. In form a debenture is a charge or mortgage upon the undertaking or property of a company, bearing a fixed rate of interest, and either repayable within a fixed term of years or irredeemable during the existence of the company. A person to whom the interest and the principal money are secured is called a debenture holder. Object

There is no precise definition of what a debenture is, and the term is not a technical one. In *Levy v. Abercorris Co.* (1888), it was remarked by Chitty, J., "I Definition

cannot find any precise legal definition of the term. It is not either in law or commerce a strictly technical term, or what is called a term of art." Debenture has been applied to describe such an instrument as a railway mortgage or bond, and also a personal security, e.g. the Tichborne Bonds. The last-named, however, can have little or nothing in common with a debenture secured by mortgage, either from the point of value or from the point of the legal rights and remedies available to the debenture holder.

Debentures are sometimes distinguished from debenture stock. In reality the holders of each stand very much in the same position. The difference is mainly in the mode of transfer. Ordinarily debenture bonds are transferable only in their entirety; debenture stock may be transferred in whole or in part, provided that such part does not involve a fraction of a stated amount. Stock is frequently made transferable in multiples of £10. There are also other peculiarities of transfer, the object being to secure identification.

Debentures
and
debenture
stock

Classification

There are many varieties of debentures, but two broad divisions stand out prominently—

(a) Mortgage debentures, which give a charge upon the whole or a portion of the assets of the company;

(b) Debentures which give no such charge, and merely amount to a promise to pay on the part of the company. The former are much more common than the latter.

Another classification is as follows—

(a) Debentures payable to a registered holder.

(b) Debentures payable to bearer simply.

(c) Debentures payable to a registered holder, but with interest coupons payable to bearer.

(d) Debentures payable to bearer, but with power for the bearer to have them placed on a register and to have them at any time withdrawn therefrom.

The first and third classes are generally known as "registered debentures," the second and fourth as "debentures to bearer." It has been held that debentures to bearer are negotiable instruments in the full

sense of the term by the general custom of merchants (*Bechuanaland Exploration Co. v. London Trading Bank* (1898); *Edelstein v. Schuler & Co.* (1902)).

The document which is the security of the debenture holder sets out the terms of the contract entered into between the parties, and the conditions are invariably endorsed upon it. The precise form will depend upon the nature of the business carried on by the company, and the peculiar circumstances of each case.

Registered debentures are expressed to be payable to the registered holders thereof. If any change of ownership is to take place, they must be transferred as shares or stock, and the instrument of transfer must also be registered with the company. Debentures to bearer are payable to the bearer thereof, and are transferable by delivery. No holder is registered, and therefore the transfer stamp duty is avoided. But, on issue, debentures to bearer are liable to a higher rate of stamp duty than are registered debentures.

Registered
debentures

For the greater security and protection of the debenture holders the property of the company is frequently conveyed by way of mortgage to trustees to be held in trust for the holders. The deed by which this is effected is called a "covering" or a "trust" deed. If such a deed is in existence the debentures themselves should contain a condition incorporating its terms by reference.

Trust deed

If property is comprised in the deed, other than freeholds or leaseholds, such as stock-in-trade, book debts, etc., it is the usual thing to make it subject to what is called a "floating charge." Such a charge allows the company to deal with its movable property in the ordinary course of business, so long as it is a going concern, which it could not strictly do were it subject to a "fixed" charge. But as soon as a receiver is appointed, or the business of the company comes to a standstill, or there is a winding up, the charge crystallises and becomes enforceable. In *Governments Stock Investment Co. v. Manila Railway Co.* (1897), Lord Macnaghten said: "A floating security is an equitable charge on the assets for the time being of a going concern; it attaches

Fixed and
floating
charges

to the subject charged in the varying condition it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default." Thus, for instance, when a company is carrying on business, and no receiver has been appointed or no winding-up order made, the fact that there is a floating charge does not give the debenture holder the right to require that any particular debt owing to the company shall be paid to him. And again, if a debt owing to the company has been garnisheed, the garnishee cannot refuse to pay the judgment creditor because he is aware that the company has issued debentures.

Registration
with the
Registrar of
Companies

Where debentures are secured by means of a charge on the company's property or undertaking, it is necessary that particulars of the charge, together with the instrument by which the charge was created or evidenced, be delivered to the Registrar of Companies within twenty-one days of the creation of the charge. Failure to comply with this requirement makes the charge void against the liquidator and any creditor of the company.

The register is a public one, and any person can inspect it on payment of one shilling. An omission to register the charge within the prescribed time renders it void as regards the property comprised in it, though the omission does not invalidate the covenant to pay the debt.

It is the duty of the company to cause the particulars of the charge to be registered, but registration may be effected on the application of any person interested therein.

Company's
register of
charges

Every company must cause a copy of every instrument creating any charge requiring registration to be kept at the registered office of the company.

Moreover, every limited company is required to keep at its registered office a register of charges and to enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company.

This register and the copies of the instruments creating the charge are open to inspection during business hours (subject to reasonable restrictions) by any member or creditor of the company without fee. The register is open to the inspection of any other person on payment of a fee of one shilling.

The power to borrow upon debentures is generally provided for by the memorandum or the articles of association, though it is sometimes implied. If both are silent upon the subject, a special resolution is necessary before debentures can be issued.

The rights of a debenture holder who has a charge upon the property of a company are—

Rights of
debenture
holders

(1) To sue for repayment of the principal and any interest which is owing.

(2) To present a winding-up petition against the company.

(3) To prove for the debt in the winding up.

(4) To appoint a receiver.

The last of these is that most frequently resorted to by the debenture holder; because a company may be merely in temporary difficulties from which a little judicious management may extricate it. And it will almost always be the fact that the security is good enough to allow of the business being carried on without any undue risk to that security.

A debenture holder is a secured creditor, and therefore is preferred, as far as his security goes, to the general creditors of the company. But the payments which are made preferential by the Act (see page 220, *post*) must be met before any of the assets realised by the receiver, or otherwise, are distributed amongst the debenture holders.

Registration of Charges. Reference has already been made to the register of charges kept by the Registrar

of Companies, and to the company's register of charges (see page 215, *ante*). It is only necessary now to indicate briefly the charges which require registration in those registers, in addition to a charge to secure debentures.

The following charges, if created after 1st July, 1908, require to be registered with the Registrar of Companies by virtue of sect. 79 of the 1929 Act—

(1) A charge for the purposes of securing any issue of debentures ;

(2) A charge on uncalled capital of the company ;

(3) A charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale ;

(4) A charge on land, wherever situate, or any interest therein ;

(5) A charge on book debts of the company ,

(6) A floating charge on the undertaking or property of the company.

The following charges require registration if created after 1st November, 1929—

(7) A charge on calls made but not paid ;

(8) A charge on a ship or any share in a ship ;

(9) A charge on goodwill, on a patent, or a licence under a patent, on a trade-mark or on a copyright, or a licence under a copyright.

Dividends. The dividends are the returns made to shareholders for the moneys invested in a company, and the manner in which they are payable is determined in accordance with the rules laid down in the memorandum or the articles of association.

Rules as to
payment of
dividends

It is for the directors to declare what dividends shall be paid, and they should keep the following points in mind—

(1) Dividends are not to be paid out of any fund except profits (*In re Sharpe* (1892)).

(2) Payment out of capital is *ultra vires*, as such a payment amounts to a reduction of the capital, and no such reduction is permissible without the sanction of the court. Under the provisions of sect. 54 of the Act, however, interest may be paid out of capital with the

sanction of the Board of Trade, where shares are issued to raise money to defray the expenses of certain works which cannot be made profitable for a lengthened period.

(3) No authority given by the memorandum or the articles of association, or by a general meeting of the shareholders, can override the law on this subject as set out in the Companies Act (*Trevor v. Whitworth* (1887)).

(4) Directors who are parties to an irregular payment of a dividend are jointly and severally liable to refund the amount of the same (*Flitcroft's Case* (1882); *In re Kingston Cotton Mills Co.* (1896)).

(5) If the directors are parties to the payment of a fictitious dividend in order to raise the price of the company's shares, they may be criminally indicted for conspiracy (*R. v. Esdaile* (1858)).

There is nothing in the Act which requires that capital shall be made up if lost. Moreover, the mode in which dividends are to be paid and profits calculated is left to be regulated by the commercial world (*Lec v. Neuchatel Asphalte Co.* (1889); *Verner v. General & Commercial Investment Trust* (1894)). In the case of *Long Acre Press, Ltd. v. Odhams Press, Ltd.* (1930), where a company issued notes which entitled noteholders to a fixed amount per cent and to an additional share of the profits available for dividend, the court held that the directors were entitled to apply the profits of any one year, after payment of the fixed amount per cent to the noteholders, in reduction of the adverse balance of previous years, and that the noteholders were not entitled to claim a share in such profits.

DISSOLUTION AND RECONSTRUCTION

Winding Up. The existence of a company as a corporate body is terminated by a process which is called "winding up." The term is generally applied to those proceedings which correspond to the bankruptcy of an individual, but it is not exclusively so. If for any reason the company considers that its business ought to come

to an end, even though it is perfectly solvent, or if there is a desire to amalgamate with another company, or to reconstruct the company itself, it is necessary, unless use is made of the provisions of sects. 153 and 154 of the Act of 1929 (see page 224, *post*) that the company be wound up.

There is another method of ending the existence of a company, viz. by the Registrar's striking its name off the register. This is a rare occurrence, and is provided for by sect. 295 of the Act of 1929.

Modes of
winding up

There are three kinds of winding up—

(1) By the court, which is compulsory.

(2) By the act of the company, which is voluntary.

(3) By the act of the company under the supervision of the court, which is partly voluntary and partly compulsory.

Jurisdiction

I. Compulsory Winding Up. Proceedings must be taken in the High Court, unless the registered office is situated within the jurisdiction of the Chancery Courts of the Counties Palatine of Lancaster and Durham.

If the paid-up capital of the company does not exceed £10,000, proceedings may be taken in the County Court of the district in which the registered office of the company is situated, unless the Lord Chancellor has excluded it from exercising jurisdiction. This does not include the Metropolitan County Courts, which have no winding-up jurisdiction. The County Court has concurrent jurisdiction in these cases.

When
company
may be
wound up

A company may be wound up by the court—

(1) Whenever it passes a special resolution to that effect.

(2) If default is made in delivering the statutory report or in holding the statutory meeting.

(3) Whenever it does not commence its business within a year from its incorporation, or suspends its business at any time for the space of a year.

(4) Whenever the number of its members is reduced to less than seven (or in the case of a private company, below two).

(5) Whenever it is unable to pay its debts.

(6) Whenever the court is of opinion that it is just and equitable that it should be wound up.

What is a "just and equitable" cause depends upon the facts of each particular case. Upon this point the case of *In re Brinsmead (T. E.) & Sons* (1897) provides an interesting illustration. The head-note of that case is as follows: "A company fraudulent in its inception, carrying on a small business at a loss, having no capital of its own—all the subscribed capital having found its way into the hands of the real, though not the ostensible promoters—and hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, was ordered by the Court of Appeal to be wound up, the court holding that the case was one in which it was 'just and equitable,' within sect. 79, subsec. (5) of the Companies Act, 1862 [*now sect. 168 (6) of the 1929 Act*] to make the order, that being the most effective means for recovering for the shareholders the money dishonestly retained by the real promoters." Also a company will be ordered to be wound up when its principal object and substratum are gone (*In re Amalgamated Syndicate* (1897)).

The most common ground for instituting proceedings to wind up a company is its inability to pay its debts. Any creditor whose debt amounts to £50 or more may serve a demand upon the company requiring payment thereof. If the company neglects for three weeks to pay, secure, or compound for the debt, it is deemed to be unable to pay its debts. The presumption will exist also if execution is issued against the company, and the execution is returned unsatisfied. In the case of an unsatisfied judgment, it is not essential that the debt of the petitioning creditor should amount to £50, but the court will generally decline to make a winding-up order unless there are special circumstances which make it just and equitable that it should do so.

The proceedings for winding up are commenced by a petition, and, if an order is obtained, the business of the company is put an end to except for the purposes of the winding up. The management of its affairs passes

Inability
pay debts

Commence-
ment of
winding up

into the hands of a person called a "liquidator," who is appointed by the court. Until he is appointed, the Official Receiver in Bankruptcy is, by virtue of his office, the provisional liquidator. To assist the liquidator in his work, and in certain cases to control him, a "committee of inspection" is often appointed. This committee consists of from three to five persons.

**Duties of
liquidator**

The duties of the liquidator are to report upon the whole affairs of the company, to collect the debts due to it, to dispose of its property, and generally to do all such things as are necessary to end its existence in a fair and equitable manner. If the shares of the company have not been fully paid up, and the assets are insufficient to meet all liabilities, the liquidator must call upon each shareholder to contribute rateably whatever is necessary, limited, of course, to the amount unpaid upon each of the shares which he holds. Those who are called upon to pay are known as "contributories."

Contributories

A past member is not liable to contribute in respect of any debt or liability contracted after he ceased to be a member of the company, nor in respect of any debt if he has ceased to be a member for a year prior to the commencement of the winding up. But a person who has ceased to be a shareholder within a year of the commencement of the winding up may sometimes be called upon to contribute towards the liabilities of the company if the transferee of his shares is unable to pay the calls made. Such a shareholder is placed upon what is known as the "B" list of contributories, the other list, called the "A" list, being composed of the names of those who are members of the company at the time of the commencement of the winding up.

**Preferential
payments**

When the liquidator has collected the whole of the available funds, and has paid the costs incidental to the whole proceedings connected with the winding up, he must proceed to distribute the residue, if any, in the following manner.

By sect. 264 of Companies Act, there are to be paid, in priority to all other debts, the following.

(1) Parochial or other local rates due at the commencement of the winding up and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed up to the 5th April next before that date and not exceeding one year's assessment.

(2) Wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered during four months before the commencement of the winding up, not exceeding £50. A managing director is not a "clerk" or "servant" (*In re Newspaper Proprietary Syndicate, Ltd.* (1900)), but a secretary usually, though not always, is (*Cairney v. Back* (1906)).

(3) Wages of any workman or labourer not exceeding £25 in respect of services rendered to the company during two months next before the commencement of the winding up.

(4) Amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, 1925. This does not apply where the company is being wound up voluntarily for the purpose of reconstruction or amalgamation.

(5) Amounts due in respect of any contributions payable during the twelve months next before the commencement of the winding up by the company, as the employer of persons under the National Health Insurance Acts, the Widows', Orphans', and Old Age Contributory Pensions Act, or the Unemployment Insurance Acts. This does not apply when the company is being wound up voluntarily for the purpose of reconstruction or amalgamation.

These debts rank equally among themselves, and, if the assets are sufficient to meet them, they are paid in full, but if the assets are insufficient they abate in equal proportions.

In *Food Controller v. Cork* (1923), it was decided that Crown debts rank with other debts, and have no priority other than that given by sect. 264.

After these preferential payments have been made,

Ordinary
creditors

the ordinary creditors of the company are next in order, and their debts are paid proportionately to their claims if the assets are insufficient to meet the whole.

Secured
creditors

The debenture holders and mortgagees occupy a more favourable position. They are what are called "secured creditors," that is, they have a certain portion or perhaps the whole of the property of the company set aside for the purpose of meeting their debts, and with this property the ordinary creditors and the liquidator cannot interfere. They can realise their security without considering the liquidator. If the property secured is insufficient to meet their demands, they can realise their security and then prove as ordinary creditors for the balance of their debts. If, on the contrary, the security realises more than the amount of the debts, with interest and costs, the balance must be handed over to the liquidator. But the payments of rates, taxes, and wages have precedence over debentures and mortgages. Any residue in the hands of the liquidator after all necessary charges have been met is divisible amongst the shareholders in proportion to their holdings.

Rights of
landlord to
distrain

The landlord of the premises occupied by a company has no right to distrain after the commencement of the winding-up proceedings (Act of 1929, sects. 174 and 258). The law is different in the case of bankruptcy. (See page 438, *post*.)

Kinds of
voluntary
winding up

When all the affairs of the company have been arranged, and the liquidator has made his report to the Board of Trade and been released, an order is made by which the company is dissolved.

II. Voluntary Winding Up. The proceedings in a voluntary winding up are similar to those in a compulsory one, except that the liquidator is appointed by the company or the creditors, dependent upon whether the liquidation is a "members' winding up" or a "creditors' winding up," and the court does not, of its own motion, interfere with any of the acts that are done.

A company may be wound up voluntarily under the following circumstances.

(1) When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs upon the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

When
company may
be wound up
voluntarily

(2) If the company resolves by special resolution that the company be wound up voluntarily.

(3) If the company resolves by extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

A resolution to wind up a company voluntarily does not prevent a shareholder petitioning the court for a compulsory winding-up order (*In re National Company for the Distribution of Electricity* (1902)).

The directors of a company which it is proposed to wind up voluntarily may make a statutory declaration to the effect that they have made full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months from the commencement of the winding up. A winding up in a case in which a declaration of solvency has been made is called a "members' voluntary winding up," and a winding up when a declaration of solvency has not been made is called a "creditors' voluntary winding up." Far greater control is given to the creditors in a creditors' voluntary winding up, than in a members'.

Declaration of
solvency

III. Winding Up under Supervision. When a voluntary winding up has commenced, the court may, if a just cause is shown, intervene, and control to a certain extent the acts of the liquidator. But unless a very strong case is made out it will generally decline to interfere; and if it does intervene it will place only certain restrictions upon the voluntary liquidator, leaving the general proceedings, as far as possible, the same as in a voluntary liquidation.

In the second and third cases of winding up the

liquidator is required to make a return of the final meeting of the company to the Registrar of Companies, and the company will be dissolved three months after the date of such return.

Revival of Defunct Companies. By sect. 294 of the Act of 1929 it is provided that where a company has been dissolved, an application may be made to the court within two years of the date of the dissolution, and if sufficient reason is given the order of dissolution may be rescinded.

Reconstructions and Amalgamations. The reconstruction or amalgamation of a company can be carried out under the provisions of either sect. 234 or sect. 154.

Winding up

Under sect. 234 the liquidator is given power to accept shares as consideration for the sale of property of the company. Where a company is either proposed to be or is in the course of being wound up voluntarily, and the whole of its business or property is to be transferred to another company, the liquidator may with the sanction of a special resolution of the transferor company receive in compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company. The section also contains various safeguards of the rights of dissentient minorities.

Provisions for
facilitating
amalgama-
tions and
reconstruc-
tions

To effect a reconstruction or amalgamation under sect. 154, it is not necessary to wind up the company. By that section, where an application is made to the court to sanction a compromise or arrangement between a company and its creditors or members under sect. 153, and it is shown to the court that the compromise or arrangement is proposed for the purposes of a scheme of reconstruction or amalgamation, and that under the scheme any part of the property of the company concerned is to be transferred to another company, the court may make provision for the following matters—

(1) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ;

(2) The allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;

(3) The continuation by or against the transferee company of any legal proceedings pending by or against the transferor company ;

(4) The dissolution, without winding up, of any transferor company ;

(5) The provision to be made for any persons, who within such time and in such manner as the court direct, dissent from the compromise or arrangement ;

(6) Such incidental, consequential, and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Sect. 155 gives a company power to acquire the shares of shareholders dissenting from a scheme approved by the majority.

Any property of the company, of which the liquidator, in winding up, makes no disposition, devolves upon the Crown as *bona vacantia* (sect. 296, and see *In re Sir Thomas Spencer-Wells* (1933)).

PART III

PARTICULAR COMMERCIAL CONTRACTS

CHAPTER XII

SALE OF GOODS

THE sale of goods is the most common of all commercial contracts and one of the oldest. A knowledge, therefore, of its main points is of the utmost importance to all classes of the community. The subject was codified by the Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), which compressed into sixty-four sections a number of Acts of Parliament and a mass of cases decided in the courts.

The general law of contract, as set out in the first part of this volume, is applicable to all the subjects discussed in the third part, such as offer and acceptance, the capacity of the parties, consideration, legality, and the like, and the next five chapters, therefore, will be devoted in the main to those matters which are connected with the particular contracts named and which are peculiar to them.

Contract of
sale of goods

Definition. The definition of a contract of sale of goods, which includes a bargain and sale as well as a sale and delivery, is one "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price."

"Property"

By "property" is meant the complete ownership in the goods, the subject-matter of the contract. A person who has the property in goods, or who is the general owner thereof, is he who has a right as against the world at large to do with or to any movable thing anything which the law does not specifically forbid, and also the right to prevent all other persons from doing therewith or thereto anything which they are not specifically

authorised to do, either by law or with the consent of the owner. The property in goods must be distinguished from the limited or special right which is called "possession."

Goods are said to be in the possession of a person when they are so situated with respect to him that he has the power to deal with them as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. A thief, therefore, is in possession of an article which he has stolen, but the property is still in the original owner. Property in goods, indeed, may exist without possession, and possession without property. A person is said to have the "custody" of goods when he is in such a position that the goods may be retaken from him at pleasure.

Possession

The term "goods," as used in the Act, includes all chattels personal other than *choses in action* and money. It also includes emblements, that is, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (sect. 62). A ship is included in the term "goods" (*Behnke v. Bede Shipping Co.* (1927)). The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale. . . . called "future goods" (sect. 5).

Goods

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (sect. 6). This latter section gives effect to the decision in the case of *Couturier v. Hastie* (1856), already noticed at page 70, *ante*. In *Barrow Lane & Ballard, Ltd. v. Phillip Phillips & Co., Ltd.* (1929), it was decided that the section applies where there is a contract for the sale of specific goods, and a part of the goods without the knowledge of the parties has already ceased to exist.

Perished goods

It will have been noticed that the term "contract of

Sale and
contract of
sale
distinguished

sale" includes both an actual sale and an agreement to sell. The two must be clearly distinguished. An agreement to sell—sometimes called an executory contract of sale—is a contract pure and simple, whereas a sale—sometimes called an executed contract of sale—is something more than a contract of sale, as it includes a conveyance. The rights and obligations of the parties to the contract are not the same in a contract for sale as in an agreement to sell. The differences mostly affect procedure when action is taken after there has been a breach of contract. Thus, where goods have been sold and the buyer is in default, the seller can sue the buyer for the contract price, and proceedings may be taken either by what is known as Order XIV in the High Court, if the amount is not less than £20, or by Default Summons in a County Court, if the amount does not exceed £100. When there is an agreement for sale only, the seller's remedy is an action for unliquidated damages, and summary methods of procedure are not available.

Remedies in
case of breach
of contract

Destruction of
goods

Again, if the seller breaks his contract in an agreement to sell, the buyer has no right, in general, to the goods themselves, but his remedy is simply one for unliquidated damages against the seller; whereas, if there has been a sale, not only is there a remedy in damages against the seller, but the goods may be recovered by the buyer. The distinction is very important in case the goods are destroyed. If there has been a sale the property in the goods has passed to the buyer, and he alone is damnified by the loss. And this is so even though the goods have never been in his possession. In *Elmore v. Stone* (1809), where the buyer, after the sale, asked the seller, who was a horse dealer and livery stable keeper, to keep the horse for him at livery, it was held that the right to charge for the keep of the horse showed that the character of the seller's possession had changed and that he thenceforward kept possession of the horse as bailee for the purchaser. There was a delivery to the buyer. The authorities on constructive delivery were considered in *Dublin City*

Distillery, Ltd. v. Doherty (1914). In the course of his judgment in that case, Lord Atkinson said: "It is not disputed that if a vendor who has sold goods, should, after the sale has been completed, agree with the vendee to retain the physical possession of the goods, but on such terms that the nature and character of his former possession is changed from that of owner to that of bailee for the purchaser, that transaction will amount to an acceptance and actual receipt of the goods." Under an agreement for sale, if the goods perish before the risk has passed to the buyer, that is, before the property in them has passed to him, and the loss is not occasioned by any fault on the part of the seller or the buyer, the agreement is avoided. See the case of *Taylor v. Caldwell* (1863), which was referred to on the point of impossibility as avoiding a contract at page 110, *ante*.

An agreement for sale is transformed into a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Price. The consideration for a contract of sale must be money. If the consideration for the transfer of goods is other goods, the contract is not one of sale, but of exchange and barter. But if the consideration for transfer consists partly of goods and partly of money, it seems that the contract is a contract of sale (*Aldridge v. Johnson* (1857)).

Exchange and
barter
distinguished
from sale

The price is generally fixed by the parties. But it is not absolutely necessary that the price should be fixed beforehand. It may be left to the valuation of a third person. If, however, the third person fails to make such valuation the contract of sale is void, unless there has been fraud on the part of one of the contracting parties, or unless there has been a part performance of the contract. When no price has been named and no method of valuation agreed upon, and when the third party has failed to fix a price and some of the goods have been delivered, the buyer must pay a reasonable price. What is a reasonable price will depend upon the circumstances of each particular case. It may or may not be in excess of the current market price.

Failure to fix
price

Reasonable
price

Gift and sale distinguished

When there is a transfer of goods by one person to another, or by one part owner to another part owner, without any price or other consideration passing between the parties, the transaction is called a gift. An agreement to give is of no legal effect. It cannot be enforced. Unless the gift of goods is made by deed it is incomplete until delivery has been made to the donee (*Cochrane v. Moore* (1890), where the principal cases on the question of the necessity for delivery to pass property to a donee were considered).

Formation of the Contract. Until the reign of Charles II no formality was necessary as regards the contract for the sale of goods. The contract might have been made by deed, or evidenced by writing, but an oral agreement was quite sufficient. The Statute of Frauds, however, to which reference has been made on several occasions, enacted that all executory contracts of sale, where the price of the goods, wares, or merchandise was £10 or upwards, should not be allowed to be good—though judicial construction interpreted this to mean unenforceable by action—unless there was some note or memorandum of the transaction made and signed by the party to be charged, or unless there had been some act of part performance. This was the effect of the seventeenth section. The Statute of Frauds Amendment Act, 1828, commonly called Lord Tenterden's Act, extended this provision to the case of goods which were not in existence or not fit for delivery at the time of the making of the contract.

Section 4 of Sale of Goods Act

By the fourth section of the Sale of Goods Act, 1893, the law upon the subject of the formation of the contract was re-stated, though the section reproduces, in substance, the former statutory provisions together with the interpretations placed upon them by the court. As this section is so very important, the first two subsections should be committed to memory. They are—

Terms of the section

“A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give

something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

"The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

It is to be noticed that the section fixes the value at ten pounds; it is not the price of the goods, which might be something very different from the value. The fact that there is no note or memorandum in writing in existence does not affect the validity of the contract. It is simply unenforceable by action. The absence of writing does not prevent the property in the goods passing to a purchaser (*Taylor v. Great Eastern Ry. Co.* (1901)). In order to claim the benefit of the Act the section must be specially pleaded in any proceedings either in the High Court or a County Court.

"Value of ten pounds"

It might appear, at first sight, that the provisions of the statute would not apply if there was a purchase of a considerable number of articles, each of a value of less than £10, although the total amounted to more than that sum. But it was long ago decided, in *Baldev v. Parker* (1823), that this is not so. The contract for sale entered into with any particular tradesman for a number of articles is on the same footing as a contract for the sale of any one article. The rule is different when the sale is by auction. Each lot is the subject of a separate contract of sale (sect. 58).

The second sub-section of the fourth section was framed to meet the decision in *Lee v. Griffin* (1861). That was an action brought to recover the price of artificial teeth. The price was £21 and there was no note or memorandum to satisfy the seventeenth section of the Statute of Frauds. The question to be decided

Goods not in existence when contract made

was whether this was a contract for the sale of goods or whether the action should be for work, labour, and materials supplied. It was decided it was a sale, and the rule laid down was that if a contract is of such a nature that when carried out it must result in transferring from one person to another for a price a chattel in which the latter person had no previous property the contract is one for the sale of the chattel. The same decision was arrived at in *Isaacs v. Hardy* (1884), where an artist was engaged to paint a picture upon a given subject. But where a publisher was engaged to bring out a book, he supplying the materials, the contract was held to be one for work and materials, and not of sale (*Clay v. Yates* (1856)). A very slight consideration will make the distinction between these cases manifest.

Note or memorandum

The note or memorandum in writing sufficient to supply the requirements of the Act has been already referred to under the general law of contract (see page 47, *ante*), and it has been pointed out that care is needed in seeing that the whole of the terms of the contract are accurately and fully set out.

Part payment or earnest

There is no difficulty in understanding part payment or earnest. If what the buyer gives is money, it is presumed to form a part of the price. Otherwise, the thing given is in the nature of a pledge. There must, however, be an actual transference. The north country custom of stroking the palm of the hand with a coin is not sufficient (*Blenkinsop v. Clayton* (1817)). It was decided in *Walker v. Nussey* (1847), that the relinquishment by the buyer of a debt owing to him by the seller was not a part payment within the meaning of the Statute of Frauds, and this decision was followed in *Norton v. Davison* (1899).

"Acceptance"

It is not always easy to arrive at the meaning of acceptance and receipt. "Acceptance" is not here used in the ordinary and popular sense of the word. By the third subsection of sect. 4, it is declared that "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale,

whether there be an acceptance in performance of the contract or not." It cannot be said that the subject is free from doubt. There are numerous cases which are worthy of consideration, but the most valuable are referred to in *Abbott v. Wolsey* (1895). In that case the defendant purchased a quantity of hay—there being no note or memorandum in writing signed by him—and when it was delivered he took a sample and examined it. Thereupon he said, "The hay is not to my sample, and I will not have it." It was held, upon the facts, that there was evidence of an act done by the buyer in respect of the goods which recognised a pre-existing contract of sale, and that there had been a sufficient acceptance to satisfy the requirements of the statute.

The note or memorandum in writing made for or relating to the sale of goods, wares, and merchandise requires no stamp. The exemption from stamp duty, however, does not apply if the sale is made by deed.

Stamps

As the Statute of Frauds never applied to Scotland, the fourth section of the Sale of Goods Act is expressly excluded from operation in that country.

Act does not
apply to
Scotland

Caveat Emptor. At common law there was no implied warranty or condition that the subject-matter of a contract of sale was fit for any particular purpose. It was the duty of the buyer to make himself acquainted with the defects, if any, of the goods he was purchasing, and if he did not do so he had no remedy against the seller, except in the cases of misrepresentation and fraud. A well-known authority upon the subject of Sale of Goods has thus expressed himself: "The buyer is always anxious to buy as cheaply as he can, and is sufficiently prone to find imaginary faults in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding its defects. If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or

Common law
rules as to
implied
conditions and
warranties

skill by requiring a warranty from the vendor of any matter the risk of which he is unwilling to take upon himself." But for the convenience and expansion of commerce the law was gradually compelled to imply the existence of warranties and conditions in certain cases, and in other cases various Acts of Parliament were passed to exclude the common law rule. Nevertheless, subject to the provisions of the Sale of Goods Act and the other statutes passed upon the subject, there is still no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale (sect. 14). The maxim *caveat emptor* (let the buyer be on his guard) is far from dead yet.

Conditions and Warranties. Contracts of sale are frequently made subject to certain stipulations, and it is a matter of importance to determine whether these stipulations are or are not of the essence of the contract. With the exception of a stipulation as to the time of payment—unless a different intention is expressed—the question as to whether a stipulation is or is not of the essence of the contract depends upon the terms of the contract itself. These stipulations are generally known as conditions or warranties.

Conditions

The term "condition" as applied to a contract may mean either an uncertain event on the happening of which the obligation of the contract is to depend, or a stipulation in the contract making its obligation dependent upon the happening of the event. The Sale of Goods Act does not define the term "condition," although it uses it frequently, and the definition above, therefore, is that belonging to the general law of contract. Any failure to fulfil a condition is a ground for the repudiation of the contract.

Warranties

On the other hand, a "warranty" is defined by the Sale of Goods Act (sect. 62) as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and

treat the contract as repudiated." The difference of the remedy in cases of conditions and warranties must be carefully borne in mind, though the distinction between the terms is not often observed by judges and textbook writers.

No particular form of words is needed to create a warranty, as every affirmation which is made at the time of the sale of a personal chattel is a warranty, if it appears to have been intended as such. Still, some test is necessary in order to decide whether there is really a warranty, and the best one that can be applied seems to be this: Did the seller who made the affirmation assume to assert a fact of which the buyer was ignorant? If he did so, then he warranted. The warranty must be made at the time the contract of sale is entered into and must form a part of it, otherwise it is void for want of consideration (*Roscorla v. Thomas* (1842)). And this is the case even when the representation relied upon as a warranty is made before the sale (*Hopkins v. Tanqueray* (1854)), unless the representation is continuing or was originally fraudulent (*Ormrod v. Dutch* (1845)). If the contract of sale is reduced to writing, the terms of any warranty must be included in the document, as no extraneous evidence can be given to show its existence, for that would, in effect, be a variation of the written contract.

Creation of
warranty

There are many cases in which it is difficult to determine exactly whether a stipulation is a condition or a warranty. That depends, primarily, upon the construction of the contract, for a stipulation may be, in fact, a condition, although it is called a warranty. Again, where a contract of sale is not severable and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition may be treated, as far as the remedy is concerned, as a breach of warranty, unless there is a term in the contract, expressed or implied, to the contrary. And lastly, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the

Conditions and
warranties
distinguished

condition, or may elect to treat the breach of the condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

Express and
implied
conditions and
warranties

Any representation which amounts to a warranty is called an express warranty, but the law now implies certain conditions or warranties as to title, quality, and fitness, unless they are expressly excluded by the terms of the contract, or unless the circumstances of the case show a different intention.

Condition as
to title

As regards title, there is an implied condition on the part of the seller that he has, in the case of a sale, a right to sell the goods, the subject-matter of the contract, or that he will have the right to do so under an agreement for sale at the time when the property is to pass (sect. 12 (1)). Thus, when a man exposes goods for sale in his shop, it is implied that he has a good right to sell them. This appears not to have been the state of the law before the Act (*Morley v. Attenborough* (1849)), although the authority of *Morley's* case was severely shaken by the decision in *Eicholtz v. Bannister* (1864). Commenting on this latter case, an authority of great eminence wrote, "the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

Warranty as
to title

By sect. 12 (2) of the Act it is provided that the seller warrants to the buyer that the latter shall have quiet enjoyment of the goods, and that they are free from any charge or incumbrance in favour of third parties which is not declared, or which is unknown to the buyer, at the time of the making of the contract.

There is, however, no implied condition or warranty as to title where the circumstances of the contract are such as to show a different intention. For example, if a man buys goods from a sheriff or a pawnbroker, knowing that the vendor is such, he gets nothing further than a transfer to himself of such rights as the sheriff

or the pawnbroker possessed in them (*Chapman v. Speller* (1850); *Crane & Sons v. Ormerod* (1903)).

When goods are sold by description, it is an implied condition that the goods shall correspond with the description, if the buyer relies upon it. In *Varley v. Whipp* (1900), the plaintiff agreed to sell and the defendant agreed to buy a reaping machine, which the defendant had never seen, and which the plaintiff stated to have been new the previous year, and to have been used very slightly. The machine was delivered, but it was seen at once that it did not correspond with the plaintiff's statements, and the defendant returned it. In an action to recover the price it was held that there was a contract for the sale of goods by description, within the meaning of sect. 13, that, therefore, a condition was implied that the machine should correspond with the description, that there had been no acceptance within the meaning of sect. 35, that the property had not passed to the defendant within the meaning of sect. 17, and that the plaintiff could not recover.

Conditions in
case of sale by
description

As regards quality or fitness, there is an implied condition, unless expressly excluded, in the following cases—

Conditions and
warranties
as to quality
and fitness

(a) When goods are sold by a trader for a particular purpose, of which he is aware, and it is shown that the buyer relies upon the skill or the judgment of the seller, the goods must be reasonably fit for the purpose for which they are intended (sect. 14). This is so whether the seller is a manufacturer or not, but there is no implied condition of quality or fitness if a specific article is sold under its patent or trade name. The mere fact, however, that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily exclude the implication of the condition of fitness. For example, if the buyer, while using a trade name, indicates that he relies on the seller's skill and judgment for its being fit for a particular named purpose, he does not buy it "under the trade name" (*Baldry v. Marshall* (1925)). In one case (*Bigge v. Parkinson* (1862)),

(a) Sale for
particular
purpose

Patent or
trade name

where a provision dealer had undertaken to supply a troopship with stores for a voyage, and had guaranteed that the stores should pass the survey of certain officers, it was held, in spite of the guarantee and the absence of an express warranty of their being fit for the troops on the voyage, that a warranty of fitness for the purpose for which they were intended must be implied. Similarly a carriage builder was held liable for damages caused by a defective carriage pole, which was shown to be unfit and improper for the purpose for which it was intended (*Randall v. Newson* (1877)). In *Priest v. Last* (1903), a retail chemist was held liable for damages caused through the bursting of a hot-water bottle on the ground of breach of warranty of fitness. As to warranty of fitness for consumption, it was held in *Frost v. Aylesbury Dairy Co.* (1905), that where the plaintiff bought milk from the defendants which was consumed by himself and his family, and the milk contained typhoid germs and the plaintiff's wife was infected thereby and died, the purpose for which the milk was supplied was made known to the sellers by its description, and that there was an implied condition that the milk was reasonably fit for consumption, although the defect was not discoverable at the time of the sale. Quality includes state or condition. If, therefore, a vendor sells an article which is in such a condition that it is dangerous to handle, he renders himself liable to an action for damages (*Clarke & Wife v. Army & Navy Co-operative Society, Ltd.* (1903)).

In *M'Alister v. Stevenson* (1932) the House of Lords made the manufacturer liable for injury to the actual ultimate consumer, even though that consumer made no contract with him. The basis of the decision appears to be that the manufacturer put up the goods in a container which he knew would be opened by the actual consumer without any opportunities for inspection by the purchaser, and that in such a case there is an obligation to ensure that no damage results to the consumer through the manufacturer's negligence.

seller who deals in goods of that description (whether he is the manufacturer or not), they must be of a merchantable quality. If, however, the buyer has examined the goods there is no implied condition as regards defects which such examination ought to have revealed, and this is the case even if the examination is merely perfunctory (sect. 14; *Thornett & Fehr v. Beers & Son* (1919)), when there was an opportunity for proper examination. This condition, also, is not excluded by the fact that the goods are sold by sample. Thus, in *Mody v. Gregson* (1868), a firm contracted to deliver a quantity of shirtings according to sample. It was discovered that a certain quantity of china clay had been introduced into the fabric, and that, therefore, the shirtings were unmerchantable. No ordinary examination of the sample could have detected the presence of the china clay. It was held that there was a right of action for breach of an implied condition of merchantable quality. This case was followed in *Drummond v. Van Ingen* (1887), and *Jones v. Padgett* (1890). In the absence of evidence of custom, there is an implied condition that the goods which are sold by a manufacturer are made by himself (*Johnson v. Raylton* (1881)). The rule that goods bought by description must be of merchantable quality applies to sales over the counter (*Morelli v. Fitch & Gibbons* (1928), disapproving *Wren v. Holt* (1903) on this point).

In *Wren v. Holt* (1903), the court held that, where a beer-house sold beer of a particular firm of brewers only, and the beer contained arsenic, there was a sale by description, and as an examination would not have revealed the defect, the seller was liable on an implied warranty that the beer was of merchantable quality.

In *Morelli v. Fitch* (1928), the facts were as follows: The plaintiff asked for a bottle of Stone's Ginger Wine at the licensed premises of the defendant. While the plaintiff was endeavouring to draw the cork with a corkscrew, the bottle broke at the neck and injured him. The court held that the sale was one by description and that the bottle was not of merchantable

quality and consequently the condition that it was of such quality implied under sect. 14 (2) had been broken, and the plaintiff was entitled to damages.

(c) Sale by sample

(c) When the sale is by sample, in addition to the above mentioned implied condition that the goods are merchantable, there are added the following—

(1) The bulk shall correspond with 'the sample in quality.

(2) The buyer shall have reasonable opportunities for comparing the bulk with the sample (sect. 15).

See *Smith v. Hughes* (1871), referred to at page 72, *ante*.

(d) Custom of particular trade

(d) By the custom of a particular trade it may be shown that there is an implied condition or warranty upon the sale of goods connected with that trade (sect. 14). This is entirely a question of evidence (*Jones v. Bowden* (1813); *In re Walkers, Winsor & Hamon* (1904); *Peene v. Taylor* (1916)).

(e) Under Merchandise Marks Act

(e) By sect. 17 of the Merchandise Marks Act, 1887 (50 & 51 Vict., c. 28), it is provided that "on the sale or in the contract for the sale of any goods to which a trade-mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade-mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee."

(f) Under Fertilisers and Feeding stuffs Act

(f) By the Fertilisers and Feeding Stuffs Act, 1926 (16 & 17 Geo. 5, c. 45), the seller of manufactured or artificially prepared fertilisers or feeding stuffs is bound to give a particular invoice to the buyer, and this invoice has the effect of a warranty of the statements contained in it. Also on the sale of an article for use as cattle food there is an implied warranty on the part of the seller that the article is fit for feeding purposes. This implied warranty is not excluded even by the seller expressly stating that he gives no warranty (*Dobell & Co. v. Barber & Garrett* (1931)).

(g) By the Anchors and Chain Cables Act, 1899 (62 & 63 Vict., c. 23), on a contract for the sale of an anchor exceeding 168 lb. in weight, or of a chain cable, there is an implied warranty that it has been properly tested and stamped.

(g) Under
Anchors and
Chain Cables
Act

Transfer of Property. It is important to determine the exact time when the property, that is, the ownership in the goods, passes from the seller to the buyer, because, as has been already stated, the risk lies with the owner (sect. 20). Very frequently it will happen that the time of the transfer of the property is not coincident with that of the transfer of the possession.

In order to fix the time, the first thing to be done is to look at the intention of the parties. The rule is, *prima facie*, that the property in goods passes when the parties intend it to pass. But if there has been no expression of intention, and if the facts of the case do not imply something to the contrary, the following rules, which are extracted from sects. 18 and 19 of the Sale of Goods Act, are to be observed—

Time of
transfer

(a) Where there is an unconditional contract for the sale of specific goods which are ready for delivery, the property passes to the buyer when the contract is made. The fact that the time of payment or delivery is postponed is immaterial.

Unconditional
contract for
sale of specific
goods

(b) Where there remains something to be done by the seller in order to put the goods into a deliverable state, or where the goods have to be measured, weighed, or tested, the property does not pass until the act required is done and notice of it has been given to the buyer. See **Tarling v. Baxter** (1827); **Acraman v. Morrice** (1849); **Seath v. Moore** (1886); **Reid v. Macbeth & Gray** (1904); **In re Blyth Shipbuilding Co., Forster v. Blyth Shipbuilding & Dry Docks Co.** (1926).

Something
remaining
to be done to
put goods into
deliverable
state

(c) Where goods are delivered to the buyer on approval, or "on sale or return," or on other similar terms, the property in them passes to the buyer as soon as he approves of them, or does some act showing his adoption of the transaction; and he will be presumed to have approved of the goods if he retains them, and gives

Goods
delivered on
approval

no notice of rejection within a reasonable time. See *Ex parte Wingfield* (1879); *Elphick v. Barnes* (1880); *Kirkham v. Attenborough* (1897); *Weiner v. Gill*, *Weiner v. Smith* (1906); and *Berry & Son v. Star Brush Co.* (1915).

Unascertained
or future
goods sold by
description

(d) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description in a state ready for delivery are unconditionally appropriated to the contract by either party with the express or implied assent of the other, the property in these goods passes at once to the buyer. Such an appropriation is made when the goods are delivered to a carrier for transmission to the buyer.

Reservation of
right of
disposal until
certain
conditions
fulfilled

(e) Where there is a reservation by the seller of the right of disposal of the goods until certain conditions are fulfilled, the property in the goods will not pass until the conditions have been fulfilled, notwithstanding the delivery of them to the buyer, or to some other person on his behalf.

Transfer of Title. In the preceding section it has been assumed that the vendor had, in every case, complete authority to transfer the property in the goods, either as being the owner of them, or as being an agent duly appointed for that purpose by the owner. But if the transfer has been made by any other person, the buyer will not, apart from the exceptions referred to below, acquire any greater right to the goods than that possessed by the transferor (Sale of Goods Act, sect. 21). The maxim of the law is that no one can give that which he has not got—*nemo dat quod non habet*—unless it happens to be a negotiable instrument (see page 257, *post*); and therefore no one can transfer the ownership of goods when he himself has nothing more than the possession of them (*Cundy v. Lindsay* (1878)). The rightful owner can at any time follow the goods and demand restitution of them, without compensation, from a person who has bought them or had them transferred to him, whether value has or has not been given. The transferee must rely upon his own remedy, such as damages for breach of an implied condition of title, against his immediate transferor.

General rule—
*nemo dat quod
non habet*

The chief exception to the rule that a purchaser obtains no property in goods of which his immediate transferor was not the owner is the case of the sale of goods in "market overt" (sect. 22). This phrase signifies any open, public, legal market (*Lee v. Bayes* (1856)). All shops (but not auction rooms) in the city of London are market overt for the purposes of their own trades, and outside the limits of the city the name is applied to particular places which are set apart for a market by grant or prescription (*Moyce v. Newington* (1878)). If then goods are purchased in market overt the purchaser acquires the property in them with the sale. But the purchaser must act with the utmost good faith, and without notice of any defect or want of title on the part of the transferor. Any suspicious circumstances or secret dealing will destroy the privilege. In the case of **Hargreave v. Spink** (1892), certain pearls which had been stolen were sold to a jeweller who carried on business in the city of London. The transaction took place in a show-room over the shop. It was held that since the sale was not conducted in the shop itself, but in a separate room, the privilege of market overt did not apply at all, and that the purchaser could not, under the circumstances, acquire a good title to the goods. It was further said, by Wills, J., that the custom of market overt would not apply to the case of a sale in a shop in the city of London where the shopkeeper was the purchaser and not the seller, and this contention was subsequently upheld in *Ardath Tobacco Co. v. Ocker* (1931), where it was held that a tobacconist who purchased at his shop cigarettes which had been stolen was not protected by the rule in market overt.

Exceptions to rule—
1. Sale in market overt

The benefit of market overt, moreover, will be entirely lost if the goods are the proceeds of a felonious taking, and the thief is afterwards prosecuted and convicted, for the property in the goods at once reverts to the original owner of the goods or his personal representatives (sect. 24 (1)). The strictness of this rule, however, is relieved by subsect. (2) of sect. 24 of the Act, which makes an exception in favour of the purchaser,

Effect of felonious taking

Sale of goods
obtained by
means not
amounting to
larceny

whether in market overt or otherwise, of goods which have been obtained by the vendor through means which do not amount to larceny. If they have been obtained by false pretences, which is a misdemeanour, the purchaser is quite safe, even though the person who obtained the goods by false pretences is prosecuted and convicted (sect. 24). But if goods are obtained on the hire-purchase system, and the hirer disposes of them to a purchaser, the original owner will be entitled to the goods if the hirer is prosecuted and convicted (*Payne v. Wilson* (1895)).

Example

An illustration will make the distinction clearer. A steals a number of sheep from B, and sells them to C in market overt. C obtains a good title and can keep the sheep until B prosecutes A to a conviction. Then C must give up the sheep to B. But if A obtains the sheep from B by means of a fictitious cheque, and then sells them to C, whether in market overt or otherwise, C is entitled to retain the sheep as against B, even though A is prosecuted and convicted for false pretences. C must, of course, have acted with perfect good faith in the matter in order to obtain this benefit.

The peculiar privilege of market overt does not apply to the sale of horses, which is provided for by two statutes, an Act against the Buying of Stolen Horses, 1555 (2 & 3 Phil. and Mar., c. 7), and an Act to Avoid Horse Stealing, 1589 (31 Eliz., c. 12). Neither does market overt apply to Scotland.

2 Re-sale by
seller retain-
ing possession
of goods after
sale

A second exception shows the importance to the buyer of obtaining possession of the goods as soon as possible after the completion of the contract of sale, and the passing of the property in them to the purchaser. For when a person who has sold goods remains in possession of them, or of the documents of title to them, and then transfers the goods or the documents of title to the goods to a third person, the prior purchaser loses all rights to the goods unless it is shown that the third person did not act in good faith, or that he was aware of the previous sale (sect. 25).

Another exception is the case of the purchaser obtaining possession of the goods, or of the documents of title to the same, under a sale or an agreement for sale, and transferring them to a third person without any notice of the existence of any lien or other right on the part of the original vendor. The third person obtains the property in the goods, as though the transfer had been made by a mercantile agent, as defined by the Factors Acts, and the original vendor is left to his own remedies against the original purchaser (sect. 25).

3 Re-sale by buyer obtaining possession of goods under agreement for sale

Sometimes the owner of goods is precluded by his conduct from denying that the seller has authority to sell them (*Pickard v. Sears* (1837)), e.g. he may have given the purchaser to understand that he can buy the goods. This is an application of the doctrine of estoppel referred to at page 12.

4 Estoppel

Certain statutes enable a person to sell goods and give a good title, although the seller is not the true owner. The Factors Act, 1889, has already been referred to at page 124; and the following other important cases may be mentioned—a landlord may sell certain goods which have been distrained for rent; a pawnbroker may sometimes sell pledges under the Pawnbrokers Act, 1872; innkeepers may sometimes sell goods deposited to pay for board and lodgings (Innkeepers Act, 1878, sect. 1); personal representatives may sell under sect. 39 of the Administration of Estates Act, 1925, and a trustee in bankruptcy under the Bankruptcy Act, 1914, sect. 55.

5 Other cases

Where the title of the vendor to the goods sold is voidable and not void, and his title has not been avoided at the time of the contract of sale, the purchaser obtains a good title, provided he acts in good faith, and has no notice of the defect of title on the part of the vendor (sect. 23).

Sale under voidable title

In connection with the present part of the subject reference must be made to what are called "hire-purchase" agreements. These are arrangements by which it is agreed that the goods are to be transferred

Hire-purchase agreements

in consideration of a certain number of periodical payments. Until the whole of the payments have been made the property in the goods remains in the vendor or letter. But as the hirer—who is to become the eventual purchaser—gains possession of the goods he can dispose of them and give a good title to a third person if the agreement is enforceable as a sale, as was the case in *Lee v. Butler* (1893). To prevent such a result it is now a common practice to have the hire-purchase agreement drawn up in such a manner that the hiring may be terminated on the happening of certain events, or at the option of either party. The sale is then subject to a condition precedent, and the hirer is unable to give a title to any person who takes the goods from him so long as the hiring continues. This was clearly pointed out in *Helby v. Matthews* (1895) which was distinguished from the case of *Lee v. Butler*. These two cases should be studied and compared most carefully by all those persons who have anything to do with hire-purchase agreements, as they set out very distinctly the main points of law to be considered in connection with such agreements. It must not be imagined, however, that these cases are exhaustive of the law upon the subject. There are large numbers of agreements in existence which are marvels of ingenuity, and the greatest caution is necessary on the part of those who bind themselves by them. As to reputed ownership under hire-purchase agreements, see the chapter on Bankruptcy, page 425, *post*.

An interesting case of lien arising out of a hire-purchase agreement is that of *Keene v. Thomas* (1905). Under a hire-purchase agreement the plaintiff let a dog-cart to a person who sent the cart, in the ordinary course, to be repaired by the defendant, a coach-builder. There was a clause in the agreement which bound the hirer to keep and preserve the dog-cart from injury. As the hirer failed to pay his instalments the plaintiff sought to recover his cart, and brought an action against the coach-builder, who claimed a lien upon it for the cost of repairs. It was held that under the

circumstances the hirer had authority to send the cart to be repaired, and that the defendant had a lien for the work done not only against the hirer but also against the plaintiff.

The decision in *Keene v. Thomas* was followed in that of *Green v. All Motors, Ltd.* (1917), which was also a case of hire-purchase. The plaintiff let a motor-car to a person who agreed to "keep the car in good repair and working condition," and the car was to be the property of the plaintiff until all the instalments were paid. During the currency of the agreement the car was injured in an accident and the hirer sent it to the defendants to be repaired. The defendants were informed that the car was held on a hire-purchase agreement. After the car was sent to the defendants, and before the contract for the repairs was made, default was made in payment of an instalment under the hire-purchase agreement. The plaintiff did not terminate the agreement until after the repairs had been commenced, when he demanded the car from the defendants, but did not tender the amount then due for the cost of the repairs. The defendants refused to deliver it up, claiming a lien on the car for the cost of the repairs. The repairs were subsequently completed. It was held that the defendants had a lien on the car as against the plaintiff for the cost of the repairs.

Performance of the Contract. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, according to the terms of the contract of sale (sect. 27). Unless it is otherwise agreed, for example, if credit is to be given, delivery and payment are concurrent conditions, that is, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods (sect. 28). Delivery

Delivery to a person with apparent authority to receive fulfils the obligation to deliver at the buyer's premises. The fact that the person receiving the goods has obtained admission to the buyer's premises by fraud

in order to receive the goods does not affect the question of delivery as long as such person had apparent authority to receive (*Galbraith & Grant, Ltd. v. Block* (1922)).

Time as
essence of
contract

Whether any particular stipulation as to time is or is not of the essence of the contract depends upon the terms of the contract.

Constructive
delivery

Delivery signifies transfer of possession. In order to be effective such transfer does not require the actual physical handing over of the goods. For example, the delivery of the key of a warehouse may operate as a delivery of the goods in the warehouse, and the transfer of a bill of lading is a valid transfer of the goods named therein.

Place of
delivery

If there has been no agreement made between the parties as to the place of delivery, there is no duty on the part of the seller to send or to carry the goods to the buyer. It is quite sufficient for him to give the buyer reasonable facilities for taking possession of them. As soon as the goods are ready the vendor has performed his part of the contract, and it is for the purchaser, the debtor, to seek out his creditor and to pay him. If, therefore, nothing is said as to delivery, which is defined (sect. 62) as "voluntary transfer of possession from one person to another," it is to be implied that the place of delivery is the business house of the seller, if he has one, and otherwise his residence (sect. 29). It is a common mistake to believe that a tradesman is bound to send the goods to the dwelling of the purchaser. In the absence of any agreement, express or implied, to do so, there is no obligation of the kind resting upon him. If the goods, at the time of the contract of sale, are, to the knowledge of both parties in some place other than the place of business or the residence of the seller, that place is the place of delivery. Again, when it is agreed that the goods shall be sent by the seller to the buyer, delivery to a common carrier is *prima facie* a delivery of the same to the buyer; but the seller must, unless otherwise authorised by the buyer, take reasonable precautions for safety in contracting with the carrier as to the carriage, and, unless

otherwise agreed, if there is to be any sea transit, the seller must give such notice to the buyer as will enable the latter to effect an insurance of the goods (sect. 32). Special circumstances may alter these statutory enactments.

When the goods are, at the time of the contract of sale, in the possession of a third person, there is no delivery unless and until such third person acknowledges to the buyer that he holds the goods on his behalf. This does not affect the right to delivery which may have passed by the transfer of a bill of lading or other document of title to the goods (sect. 29).

Exact fulfilment of the terms of a contract is always demanded, otherwise the course of business would be impeded by uncertainty. When goods are sold, therefore, it is the duty of the seller to deliver the exact quantity ordered. If he delivers either more or less, the buyer has the option of refusing or of accepting the whole or any part thereof. If he accepts them he must pay for what he retains, whether more or less than the quantity ordered, at the contract rate (sect. 30). In order to avoid difficulties of this kind it is a common practice to qualify the order given for a quantity of goods by using some word or words which signify that the exact number is not so essentially a part of the contract that it will be rigidly insisted upon. For example, an order may be given for 1,000 tons of iron "or thereabout." The delivery of a few tons more or less will not avoid the contract. In *Miller v. Borner & Co.* (1900), a charterer was held to have satisfied his contract, which was to load a cargo of ore "say about 2,800 tons," where he loaded 2,840 tons in a ship of which the actual capacity was 2,880 tons. Each case must, of course, depend upon its own peculiar circumstances.

Delivery of
wrong
quantity

The delivery of goods by instalments is dealt with by sect. 31 of the Act. Unless it is otherwise agreed, the buyer is not bound to accept delivery of goods by instalments. Where, however, there is a contract for the sale of goods to be delivered by instalments, which

Delivery by
instalments

are to be separately paid for, and the seller or the buyer is guilty of a breach in respect of one or more instalments, it is a question depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. In a contract for delivery by instalments it is the duty of the court to see whether each party was ready and willing to perform his part of the contract at the time for delivery of each instalment (*Braithwaite v. Foreign Hardwood Co.* (1905)).

Rights and Remedies of the Seller on Breach. As in other cases of breach of contract the buyer and the seller of goods have a personal remedy, the one against the other, if the contract of sale is broken by the default of one of the parties. In addition, however, to the personal remedy, a seller has certain rights against the goods themselves, even though the property in them may have passed to the buyer, so long as the actual possession of them remains with the seller. But once the goods are actually delivered to the buyer, the seller has no remedy other than an action for the price of them if he fails to obtain payment. His rights over the goods have gone.

1. Lien
When right
exists

I. LIEN. The first of these rights is "lien," or detention. The seller of goods, if he has failed to obtain payment, is entitled to retain possession until the price has been paid or tendered when—

(1) The goods have been sold without any stipulation as to credit; or

(2) The period of credit has expired; or

(3) The buyer has become insolvent.

But the lien will be lost—

Loss of right

(1) If the goods are delivered to a carrier to be sent to the buyer, and the seller does not reserve the right of disposal; or

(2) If the buyer or his agent obtains possession of the goods; or

(3) If the right is waived by the seller.

II. STOPPAGE IN TRANSITU. This is an additional remedy granted to the seller against the goods themselves, allowing him to stop and to retake possession of them. It arises when the purchaser becomes insolvent, and it exists so long as the goods are on their way or in transit to the buyer, and are in the possession of a carrier or other person deputed to transmit them to the buyer. This right, like the right of lien, belongs to the seller who is unpaid, and can be exercised by him either by actually retaking possession of the goods, or by giving notice to the carrier or other person, who has them in his possession for the purpose of carriage, not to deliver them to the buyer. It is of the essence of stoppage *in transitu* that the goods should be in the possession of a middleman. The right itself has always been construed favourably to the vendor. The leading case which gave rise to the three sections (44-46) of the Sale of Goods Act upon this branch of the law is *Lickbarrow v. Mason* (1787).

² Stoppage
in transitu

The *transitus* commences when the goods are delivered to the carrier or other person. Its termination has been thus defined by Cave, J.: "When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or where the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the transit is at an end, when they have got into the hands of some one who holds them for the purchaser, and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles" (*Bethell v. Clark* (1887)). The decision in *Bethell v. Clark* was approved by the House of Lords in *Lyons v. Hoffmann* (1890).

Duration of
transit

If notice to stop goods in transit is given to a carrier and the carrier still delivers them to the consignee, the

consignor may either sue the carrier or adopt the transaction and rely on his contractual rights against the consignee. But the consignor must elect and is bound thereby (**Verschure's Creameries v. Hull & Netherlands S.S. Co.** (1921)).

Destruction of right

The seller's right of stoppage *in transitu* is destroyed if a bill of lading or other document of title has been sent to the buyer, and the buyer has endorsed it for value to a third person (**Cahn & Mayer v. Pockett's Bristol Channel Steam Packet Co.** (1899)).

3. Resale

III. **RESALE.** In addition to the rights of lien and stoppage *in transitu*, the unpaid seller has a third right, viz. that of resale, when the buyer, within a reasonable time, refuses to pay for the goods or to tender their price. At common law a lien upon chattels conferred no right of sale upon the person holding such lien, even though the retention of the chattels was attended with expense (**Thames Iron Works & Shipbuilding Co. v. Patent Derrick Co.** (1860)). But now a right of resale arises in three cases—

When right arises

- (a) Where the goods are of a perishable nature,
- (b) Where the seller has given express notice of his intention to resell, and the buyer does not tender the price of the goods,
- (c) Where the seller has reserved to himself a right of resale in case of the default of the buyer.

4. Action for price

IV. **ACTION FOR PRICE.** It has been already stated that when the property in the goods has passed to the buyer, the sole remedy of the seller, subject to the three preceding rights noticed when the goods have not got into the possession of the buyer, is an action for the price. If the buyer refuses to accept the goods when they are delivered to him—and it must be recollected what has been stated above as to the place of delivery—the remedy of the seller is an action for damages for non-acceptance. But in the latter case, if the payment is to be made on a certain date irrespective of delivery, the default of the buyer entitles the seller to maintain an action for the price irrespective of the fact that the property in the goods has not passed and that the goods

Where payment irrespective of delivery

have not been appropriated to the contract. The price is fixed, or is capable of being fixed, by the terms of the contract.

When an action for the price of goods sold is contemplated, care must be taken that proceedings are not commenced until the money is actually due, the date of which will *prima facie* depend upon the terms of the contract. But if the delivery is to be made by stated instalments, and the buyer refuses to take delivery of any part of the instalments, the seller may treat this non-acceptance as a breach of the contract and commence his action at once (*Hochster v. de la Tour* (1853)).

Money must be actually due

By the general law of England the amount of damages for non-payment of a debt at the proper time is merely nominal, and on this principle interest is not recoverable when an action is brought for the price of goods sold. By special agreement between the parties, or where the price of the goods was to be paid by a negotiable instrument, or where there exist such special circumstances as are contemplated by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), sect. 28, interest may be awarded by way of damages.

Interest on price

In transactions of any magnitude it is usual for a bill of exchange, payable at a fixed future date, to be accepted by the buyer to the order of the seller. The bill operates as a conditional payment. If it is dishonoured the debt revives, and the seller may sue either upon the bill or upon the consideration for the sale. But if he sues upon the consideration he must be the holder of the bill at the time when the action is brought (*Davis v. Reilly* (1898)).

Acceptance of bill of exchange payable at fixed future date

V. ACTION FOR DAMAGES. The other pecuniary remedy, damages, is the estimated loss which directly and naturally results from the buyer's breach of the contract of sale. This is ascertained, when there is an available market for the goods in question, by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted. It is the duty of the person injured to take all reasonable steps to mitigate the

Action for damages

Measure of damages

loss consequent upon a breach of contract (**Payzu, Ltd. v. Saunders** (1919)). How damages are calculated when there is no available market has been noticed in Chapter VIII, page 104, *ante*, where reference was made to the leading case of *Hadley v. Baxendale* (1854).

Damages

Remedies of the Buyer on Breach. When the seller wrongfully neglects or refuses to deliver the goods which have been sold according to the terms of the contract, the buyer may maintain an action against him for damages for non-delivery. The measure of damages, as in non-acceptance, is the estimated loss which directly and naturally results from the seller's breach of contract. This is also ascertained in the same way as in the converse case of non-acceptance. But special circumstances may enhance the damages, especially if there is no available market in which the buyer can obtain similar goods, or if he has made known to the seller the fact that the goods are required for a particular purpose, or if he has sustained special damage in any way, e.g. by costs in an action at law (*Agius v. Great Western Colliery Co.* (1899)). Each case, however, will depend upon its own circumstances.

Measure of
damages

Specific
performance

In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, order the seller to deliver the identical goods he has contracted to supply, that is, may decree what is called "specific performance," instead of condemning him in ordinary damages, the old common law remedy (Sale of Goods Act, sect. 52). This remedy is usually adopted where the goods are of peculiar value or great rarity and damages will not provide an adequate remedy. "Ascertained" goods in sect. 52 means goods identified in accordance with the agreement after the time a contract of sale is made (*In re Wait* (1927)).

Breach of
warranty set
up in
diminution or
extinction of
price

Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not entitled, merely by reason of such breach, to reject the goods, but he

can set up the breach in diminution or extinction of the price, or he can maintain an independent action against the seller for damages for breach of the warranty. In the case of breach of warranty of quality, the damage sustained is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. In the case of *Smith v. Green* (1875), a cow was sold, and a warranty was given that it was free from disease. This was not so, and after it had got into the possession of the purchaser a number of other cows belonging to him were attacked with the disease from which the bought cow suffered. The whole of the cows died. The seller was held liable for the entire loss sustained by the purchaser. Again, in *Ashworth v. Wells* (1898), a man bought an orchid at an auction with a warranty that it was the only known species of the plant. This turned out to be untrue. In an action for breach of warranty it was found, as a fact, that if the plant had been what it was represented to be its value would have been £50 at the time of the sale. The plaintiff was awarded that sum as damages.

Sales by Auction. The position of the auctioneer as an agent has already been referred to at page 118, *ante*. It should be observed that sect. 4 of the Sale of Goods Act applies to sales by auction, just as it applies to private sales, when the price of any particular article exceeds £10, and that the auctioneer is agent for both buyer and seller to sign the note or memorandum required.

Note or
memorandum

Where goods are put up for sale by auction in lots, each lot is *prima facie* the subject of a separate contract of sale. A sale is complete when the auctioneer announces its completion by the fall of the hammer, and until such announcement is made any bidder may retract his bid. The seller or his agent may bid at an auction only where the right to bid is expressly reserved. A sale may be notified to be subject to a reserved price (Sale of Goods Act, sect. 58).

Rules
governing
sales

An agreement between two or more persons to take

Bidding
agreements

part in a mock auction and induce a person to buy at an excessive price amounts to a criminal conspiracy. As a general rule, however, an agreement between two persons not to bid against each other at an auction is not void (*Rawlins v. General Trading Co.* (1921)). But where one or more of the parties to the agreement is a dealer who gives or receives a reward for abstaining from bidding, he is guilty of an offence by virtue of the Auctions (Bidding Agreements) Act, 1927 (17 & 18 Geo. 5, c. 12). There is, however, nothing to prevent persons from entering into a *bona fide* agreement to purchase on a joint account, provided that a copy of the agreement is deposited with the auctioneer.

CHAPTER XIII

NEGOTIABLE INSTRUMENTS

THE documents treated of in the present chapter form the most common examples of what are known as negotiable instruments. The maxim of the common law, *nemo dat quod non habet*, applies to the transfer of all ordinary chattels, and therefore no one but the rightful owner can, except in so far as provision is made by statute, transfer the property in them. Negotiable instruments are an exception to this rule. They have been defined by a great authority as instruments the property in which is acquired by any one who takes them *bona fide* and for value, notwithstanding any defect of title in the person from whom he took them. They differ from ordinary chattels in the following particulars—

Difference
between
negotiable
instruments
and ordinary
chattels

(1) The property in them, and not merely the possession, passes by delivery.

(2) The holder in due course (page 275, *post*) is not in any way affected by any defect of title on the part of the transferor or any previous holder. He holds the instruments "free from all the equities."

(3) The holder in due course can sue upon them in his own name.

These are the three great qualities which go to make up what is called "negotiability." A rough-and-ready test to apply when the matter is in doubt is this: Can title be made through a thief? If the answer is in the affirmative the instrument is negotiable; if in the negative it is not negotiable.

Character of
negotiability

Negotiability is a creation of mercantile custom, which became a part of the law merchant. Commerce would have been seriously hampered if it had always been necessary to inquire into the whole history of every document or chattel transferred in the course of business. Now, partly by custom and partly by statute, the character of negotiability has been acquired

What
instruments
are negotiable

by a certain number of documents and chattels. The principal of these are coin of the realm, bills of exchange, promissory notes, cheques, bank notes, exchequer bonds, treasury bills, East India bonds, bonds of foreign and colonial governments, dividend warrants, and interest warrants. It was at one time thought that the list of negotiable instruments was complete, and this was the view taken by the court in *Crouch v. Crédit Foncier* (1873). Some doubt was thrown upon this decision in *Goodwin v. Roberts* (1875) and in **London Joint Stock Bank, Ltd. v. Simmons** (1892); while in *Bechuanaland Exploration Co. v. London Trading Bank* (1898) it was held that where it had been shown that by mercantile usage the debentures of an English company were treated as negotiable, the court would give effect to such usage, even though the usage was of recent origin. This case was followed by Bigham, J., in *Edelstein v. Schuler & Co.* (1902), on similar evidence, and presumably the list of negotiable instruments may be increased almost indefinitely.

"It is sometimes said that the custom of the Stock Exchange is the only criterion of the negotiability of an instrument. No doubt the concentration in the Stock Exchange of dealings in all classes of securities renders that body a factor of ever-increasing importance in the determination of the question, and evidence from the Stock Exchange is the most valuable and carries the greatest weight in the courts; but there is no justification, certainly not in any of the earlier cases, for confining the recognition of negotiability to the Stock Exchange, to the exclusion of bankers, merchants, and other classes of the mercantile world." (Paget's *Law of Banking*, 4th Edition, p. 369.)

An IOU

An IOU is not a negotiable instrument, nor is it a receipt or an agreement. Its form is generally something like the following—

1st December, 19..

To Joseph Brown.

IOU £50.

James Jones.

An IOU requires no stamp. In an action to recover money lent, the production of an IOU by the plaintiff signed by the defendant, is evidence of an account stated between the parties, though not of the amount of money lent.

Bills of lading possess some of the characteristics of negotiability, but these will be noticed in greater detail in the next chapter. Bills of lading

The history of negotiability is set forth with great clearness in the judgment of Chief Justice Cockburn in the case of *Goodwin v. Roberts* (1875).

BILLS OF EXCHANGE. The law relating to bills of exchange, like the law relating to the sale of goods, has been codified by the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), which embodies the previous decisions of the courts and the provisions of various statutes, clears up doubtful points, and makes the law of the United Kingdom practically uniform on the subject. Generally speaking, however, the substance of the law is unaltered, and the Act is merely declaratory of the prior law (*McLean v. Clydesdale Banking Co.* (1883)). The Act has worked, on the whole, in a most satisfactory manner. The law is laid down with the utmost clearness, and the most important cases on bills of exchange which have come before the courts since the passing of the Act, have been the outcome of daring and ingenious frauds, against which no legislation can be effectually framed. There was, however, one exception, and that was the judicial construction of sect. 82, as to the liability of a banker who received payment of a cheque for a customer. The decisions in the cases of *Capital & Counties Bank, Ltd. v. Gordon*, and *London City & Midland Bank, Ltd. v. Gordon* (1903), were felt not to be in accordance with the common practices of bankers and the necessities of commercial transactions. The remedy came, however, in 1906, when the Bills of Exchange (Crossed Cheques) Act was passed. Another short Act, dealing with noting, was passed in 1917, and in 1932 the Bills of Exchange Act (1882) Amendment Act, 1932, gave legal effect to the crossing of a banker's draft.

Bills of
Exchange
Act, 1882

**Definition
of bill**

A bill of exchange is defined by sect. 3 of the Act of 1882 to be "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."

**Requisites of
valid bill**

Every word of this definition requires the most careful consideration, for if the instrument does not comply with all the requirements set out it is not a bill of exchange, and the holder will not necessarily be in possession of a negotiable instrument. Upon analysis these requirements will be seen to be (1) writing, (2) an unconditional order to pay (not a request, and not subject to any condition or contingency), (3) an order to a specified person, (4) certainty in respect of the sum of money to be paid, (5) signature of the drawer, (6) payment of money, and money only, (7) a fixed time for payment. As to (1) the writing may be made upon paper or parchment, but not upon a metallic substance, and it may be done with pencil, or in ink, and may be partly or wholly printed. As to (2), however, the indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill does not make the bill conditional (section 3 (3)). Where the drawer of a cheque (which is a bill of exchange) used a sheet of ordinary note-paper instead of a cheque form, and wrote across it, "To be retained," meaning thereby that the payee was to hold the same until an ordinary cheque was given in exchange, it was decided that those words did not make the order conditional so as to defeat the right of the holder (*Roberts & Co. v. Marsh* (1915)). As to (3), an instrument made payable to "— order" is construed as payable to the order of the drawer, and when endorsed by him is a valid bill of exchange (*Chamberlain v. Young* (1893)). As to (4), the sum payable on a bill is still "certain," within the meaning of the Act, although it is required to be paid (a) with interest, (b) by

stated instalments, (c) by stated instalments with a proviso that upon default in payment of any instalment the whole shall become due, (d) according to an indicated rule of exchange to be ascertained as directed by the bill (sect. 9).

Form of Bill. No particular form of words is necessary, but it is not often that an inland bill of exchange—that is, a bill drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein (sect. 4)—differs from the following—

"London, 1st October, 19..

"£250.

"Three months after date pay to Mr. James Thompson or order the sum of two hundred and fifty pounds, for value received.

"William Smith.

*"To Mr. John Robinson,
Bristol."*

In this example William Smith is called the "drawer," John Robinson the "drawee," and James Thompson the "payee." As soon as the drawee signifies that he has assented to the order of the drawer, which is ordinarily done either by his writing the word "accepted" across the face of the bill or "accepted payable at X Bk. Ltd." and adding his signature, he is called the "acceptor."

Drawer,
drawee,
payee, an
acceptor

The amount for which a bill is drawn is generally indicated in figures in the top left-hand corner, and in words in the body of the bill. If the amounts do not agree, that amount expressed in words governs the instrument (sect. 9), though in practice the instrument would be returned for correction.

Discrepancy
between
words and
figures on bill

A bill is not invalid by reason only of its being undated (sect. 3, subsect. (4)), ante-dated, post-dated, or dated on a Sunday (sect. 13, subsect. (2)). The holder of an undated bill may insert the true date at any time, and a mistake on his part as to the true date, if made *bona fide*, will not avoid the bill (sect. 12).

Dating

"For value received"

The words "for value received" are sometimes used, although they are not essential. In a bill of exchange there is always a *prima facie* presumption of consideration. It is not necessary to state the place where the bill is drawn or where it is payable (sect. 3, subsect. (4)).

Who are "parties" to bill

A bill in the above form, if duly stamped, is a negotiable instrument. But until the drawee has signified his acceptance he is in no way liable upon it. He is not what is called a "party" to the bill. In the same way the payee is not a party to the bill, nor is he liable thereon, until he has placed his endorsement upon it.

"At sight," "on demand," and "after sight"

Bills vary greatly as to the period for which they are made current. Some are "at sight" or "on demand," others "after sight." The time at which payment is due upon such bills will be noticed later.

The payee may be, and frequently is, the drawer himself. The wording of the bill then runs, "One month after date pay to me or my order."

Bill treated as promissory note

The drawee may be the same person as the drawer, or a fictitious person, or a person not having capacity to contract. In each of these cases the holder of the instrument may treat it either as a bill of exchange or as a promissory note (sect. 5, subsect. (2)).

Order and bearer bills

Instead of being made payable to order the bill may be made payable to bearer. This is an important difference, as it affects the mode of transfer of the bill. If the bill is payable to order no transfer is complete unless the person to whose order it is drawn—or his duly authorised agent (sect. 91)—has written his name thereon. This is called an Endorsement, which is the writing by the payee or endorsee of his signature on, usually, the back of an instrument. If the bill is payable to bearer no endorsement is required.

Fictitious payee

Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer (sect. 7, subsect. (3)). It therefore follows that a banker who pays across the counter of the bank a bill of which the payee is a fictitious or non-existent person is not liable to his customer for the amount so paid even though the payee is a fictitious person and the signature, therefore, not a

true endorsement. As to who is a "fictitious" person the case of *Bank of England v. Vagliano* (1891), should be consulted. There Lord Herschell said: "I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer." See also *Clutton v. Attenborough* (1897); *Vinden v. Hughes* (1905); *North and South Wales Bank v. Macbeth* (1908); *Goldman v. Cox* (1924).

A bill may be addressed to two or more drawees, whether they are partners or not, but it cannot be addressed to two drawees in the alternative, nor to two or more drawees in succession (sect. 6). As regards payees, a bill may be made payable to two or more persons jointly, or to one or some of several payees (sect. 7). A payee is sufficiently indicated if he is referred to as the holder of an office for the time being, e.g. the Secretary of the A B Company. Both drawee and payee must be indicated with reasonable certainty, unless, in the case of the payee, the bill is one which is, or which may be, treated as payable to bearer.

Days of Grace. A bill of exchange, regular and perfect upon the face of it, retains the special qualities of negotiability as long as it is not overdue. The holder must, therefore, present it for payment at the proper time, unless it has been previously dishonoured. In calculating the date at which a bill is payable three days are allowed, after the specified time, which are called "days of grace." If the third day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is payable on the next preceding business day; if it falls on a Bank Holiday, the bill is not payable until the next succeeding business day. If the last day of grace is a Sunday, and the

Number and
description of
parties to bill

Date at which
bill payable

preceding day a Bank Holiday, payment is due on the succeeding business day. It is a little curious that there is a difference in the date of payment of a bill in England and Scotland where the last day of grace falls on 26th December, and that day happens to be a Sunday, since Christmas Day is a Bank Holiday in Scotland and not in England. In England the bill is payable on 24th December, and in Scotland on 27th December. A right of action on a bill does not accrue until after the expiration of the whole of the third day of grace (*Kennedy v. Thomas* (1894)).

Bills payable
on demand or
at sight

There are no days of grace allowed in the case of bills which are payable on demand or at sight, and days of grace may be excluded by special wording. The word "punctually" in a promissory note, however, is not sufficient for this purpose (*Schaverien v. Morris* (1921)).

Foreign Bills of Exchange. A bill of exchange which does not fall within the definition of an inland bill, given at page 260, *ante*, is called a "foreign bill." It generally consists of a set of three bills, identical in terms, except that each is expressed to be payable only on condition that neither of the other two has been paid. The three parts are transmitted separately, and the risk of loss—for the three constitute one bill, unless the drawee accepts more than one part—is greatly diminished.

Distinction
between
inland and
foreign bills

The law affecting foreign bills is, in the main, the same as that which is applicable to inland bills. But the following differences must be noticed—

(1) Although an inland bill unless it be a cheque must be written on duly stamped paper, a foreign bill need not be stamped before it is issued. It must, however, be stamped before it can be negotiated in the British Isles, and the stamp is, naturally, an adhesive one.

(2) If a foreign bill is dishonoured (see page 279, *post*) the fact must be noted by a notary public. A declaration in writing must also be drawn up as to the dishonour and noting. This is called "protesting the bill."

The rules governing foreign bills are given in sect. 72 of the Act. Generally speaking, it may be laid down that any act in connection with a bill must be performed in accordance with the law of the country where the act has to be done. Thus, if a bill is drawn in one country, accepted in a second, and made payable in a third, there are three distinct systems of law applicable to the instrument, and each of these must be observed in order that the bill may be valid.

The following is a common form of foreign bill—

"London, 1st November, 19..

"Exchange for 50,000 francs.

"At forty days after sight of this first of exchange (second and third unpaid) pay to the order of M. Jean Berthelot fifty thousand francs, for value received, and place the same to account as advised.

"Joseph Brown.

"To M. E. Dumont,

Bordeaux.

"Payable at ———."

Stamps. By virtue of the Stamp Act, 1891, the Finance Act, 1899, the Revenue Act, 1909, and the Finance Act, 1918, an inland bill of exchange must be stamped as follows—

When payable on demand, or at sight, or on presentation, or not exceeding three days after date or sight (for any amount)	Rate of duty on inland bills
2d.	

In all other cases—

Where the amount does not exceed £10	2d
" " exceeds £10 and does not exceed £25	3d.
" " " £25 " " £50	6d
" " " £50 " " £75	9d
" " " £75 " " £100	1s

When the amount exceeds £100, 1s. for the first £100, and an additional 1s. for any fractional part of each succeeding £100. Thus, a bill for £945 not payable on demand, or at sight, or within three days after sight, must be stamped with a 10s. stamp.

Rate of duty
on certain
foreign bills

A foreign bill *drawn and expressed to be payable out of the United Kingdom*, when actually paid or endorsed or in any manner negotiated in the United Kingdom, is stamped as an inland bill, except that when the amount is between £50 and £100 a 6d. stamp only is required, and when the amount exceeds £100 a 6d. stamp is required for each fractional part of £100.

Dealing with bills of exchange which are improperly stamped renders the person so dealing liable to a penalty of £10.

With regard to stamping, it should be here noticed that a common fallacy exists as to the stamping of cheques, which are particular kinds of bills of exchange. It is generally believed that any holder of a cheque which has been issued unstamped is at liberty to affix and cancel an adhesive stamp. This is not so. The right to affix and cancel a stamp in such a case is confined to the banker to whom an unstamped cheque is presented for payment, and the banker is entitled to charge his customer with the duty or to deduct the value of the stamp from the amount of the cheque (Stamp Act, 1891, sects. 34, 38).

Capacity of Parties. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (sect. 22).

Infants,
corporations
and persons
of unsound
mind

An infant is not liable upon a bill of exchange as drawer, acceptor, or endorser, even though it is given by him for the price of necessities supplied. He can be sued only upon the consideration (*In re Soltykoff* (1891)). But the fact that an infant has drawn, accepted, or endorsed a bill does not prevent a holder from enforcing it against any other party thereto who has capacity to contract (sect. 22, subsect. (2)). The same rule applies to corporations which are under any disability to enter into contracts upon bills. Since the contracts of insane persons and drunken men are voidable only and not void, neither insanity nor drunkenness can be set up as a defence against a holder in due course.

Companies

By sect. 30 of the Companies Act, 1929, a bill of

exchange or promissory note is deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority. Every company, moreover, must have its name mentioned in legible characters in all bills of exchange, promissory notes, endorsements, or cheques (*ibid.* sect. 92).

No person is liable as drawer, acceptor, or endorser of a bill who has not signed it as such; but where a person signs a bill in a trade, or an assumed name, he is liable as though he had signed it in his own name, and the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm (sect. 23). If, therefore, a signature to a bill has been obtained by fraud, and without any negligence on the part of the person signing, a holder cannot recover against such person. Thus, in *Foster v. Mackinnon* (1869), an old man of feeble sight was induced to sign a document which he did not believe to be a bill of exchange. As it was found as a fact that he had acted without negligence it was held that he was not liable on the bill. This case was followed in *Lewis v. Clay* (1898), where a joint maker of a promissory note had been fraudulently induced to sign a document in the belief (without any negligence on his part) that he was merely witnessing the signature of the other joint maker.

Party to bill
not liable
unless signing
as such

An agent may or may not be personally liable upon a bill of exchange, according to the manner in which he has signed it (sect. 26). Thus, if he draws, accepts, or endorses, and signs, "J. S. Manager," or something equivalent, he is personally liable, for the word "manager" is merely descriptive of himself. But if the drawing, acceptance, or endorsement is given in the following or a similar form, "X & Y, Limited, J. S. Manager," and J. S. is acting within the scope of his authority, he is not personally liable at all (*Chapman v. Smethurst* (1909)). A signature by procuration operates as notice that the agent has but a limited authority to sign, and

Agents

Procuration
signature

the principal is not liable if the agent exceeds the limits of his authority (sect. 25). Upon the question of procuration signatures, the reader should refer to the important cases of *Morison v. London County and Westminster Bank* (1914), and **Midland Bank v. Reckitt** (1932). In the earlier case the effect of sect. 25 was expressed thus: "that, notwithstanding the negotiable character of the instrument and the obligations upon the signatory to such an instrument to holders, and more particularly to a holder in due course, and notwithstanding the authority given by the principal to the agent to sign negotiable instruments per procuration so as to bind the principal, the principal is not liable upon the instrument, even to a holder in due course, if the agent in so signing the cheque has exceeded the actual limits of his authority. The principal in such circumstances *and before the instrument is honoured* could refuse to pay the cheque or bill upon presentation, and would have a good defence to a claim, even when made by a holder in due course, upon the cheque or bill. . . . When a bill so signed in excess of authority has been honoured, sect. 25 does not confer a right to recover the proceeds." In **Midland Bank, Limited v. Reckett** (1932) the court held that "a bank collecting cheques signed *per pro* and under a power of attorney is by the form of signature given notice that the signature is not their customer's."

Authority to
fill in blanks

Inchoate Instruments. The signing and delivery of a blank stamped paper is a *prima facie* authority to fill it up as a bill for any amount which the stamp will cover, using the signature for that of the drawer, the acceptor, or an endorser. In like manner, if a bill is wanting in any material particular the holder has a *prima facie* authority to fill up the omission in any way he thinks fit. But the completion must be made within a reasonable time, and strictly in accordance with the authority given (sect. 20). If a signed blank stamped paper is given by one person to another, and the authority to fill in the same is clearly stated, as between the parties to the bill when completed, there is no

liability upon the person who has signed it if the authority is exceeded. But if the bill is completed and negotiated to a holder in due course, the holder is entitled to enforce payment of the amount of the bill even though the authority has been exceeded (*Glenie v. Bruce Smith* (1908)). There has been some doubt as to whether the payee of a bill is a holder in due course. Thus, where a person to whom an incomplete instrument had been given, with specific instructions as to whose name was to be inserted as payee, made it payable to some other person, it was held that the payee could not claim the amount of the bill from the signer of the incomplete instrument, since there had been no negotiation of it, the payee himself being the only holder (*Herdman v. Wheeler* (1902)); but in *Lloyds Bank v. Cooke* (1907), where the person authorised to fill up a note for a fixed amount had filled it up for a larger amount it was held that the person giving the note was estopped from setting up his agent's fraud and at the same time *Herdman v. Wheeler* was doubted. However, in *Jones v. Waring & Gillow* (1926), the House of Lords laid down the rule that the original payee of a bill cannot be "a holder in due course."

Payee not
holder in due
course

Consideration for a Bill of Exchange. Valuable consideration for a bill may be constituted by—

(1) Any consideration sufficient to support a simple contract;

(2) An antecedent debt or liability (sect. 27).

The second part of this definition is an exception to the general rule of simple contracts, that a consideration must not be a past one.

It is a presumption of law that every person whose signature appears on a bill of exchange became a party thereto for valuable consideration. This presumption, however, may be rebutted by evidence to the contrary. In an action on a bill the production of the bill itself is sufficient to establish the case of the holder until a defence of fraud, duress, illegality, or want of consideration is set up. It is then incumbent upon the holder to prove that after the alleged fraud, duress, or illegality

Presumption
that
valuable
consideration
given

value has been given for the instrument, and that the bill has been transferred to him in good faith without notice of the fraud, etc. (*Tatam v. Haslar* (1889)). In any case where it is necessary to show the existence of a consideration the adequacy of it is immaterial, unless a bill has been taken at a ridiculously low value, when it may be of importance to consider whether it was taken *bona fide* by the holder, in ignorance of the real facts of the case (*Jones v. Gordon* (1877)).

It cannot be too carefully remembered that every holder of a bill of exchange is presumed to be a holder for value, and if value has been given for it *at any time* it will be no defence to an action on the bill against any party who was a party to it previous to the time of its last transfer for value that he received no consideration for it. But there is no right of action against an immediate transferor unless value is given. For example, if a bill is drawn and accepted for value, and then transferred through the hands of several persons and at last handed as a gift to the holder, the holder can recover the amount of the bill from any person whose signature appears upon it except the person from whom he received it as a gift.

Presumption
that holder is
holder for
value

Acceptance on
collateral oral
agreement

Sometimes a bill is accepted on a collateral oral agreement that it shall be renewed if the acceptor is not in a position to meet it when it falls due. Evidence of such an agreement cannot be given on the ground that its effect would be to contradict the terms of the written document (*New London Credit Syndicate v. Neale* (1898); *Henderson v. Arthur* (1905); *Hitchings and Coulthurst Co. v. Northern Leather Co. of America* (1914)).

Holder
having lien

Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (sect. 27, subsect. (3)).

"Accommo-
dation bills"

Many bills are drawn, accepted, and put into circulation without any consideration passing, the various signatories lending their names to oblige their friends. Such bills are called "accommodation bills" or "pig on

pork," and the persons who draw, accept, or endorse them are called "accommodation parties." Until value has been given no party is liable to pay the amount of such a bill; but directly value has been given, a holder in due course has a right to proceed against any of the signatories, even though he is aware of the fact that the instrument is only an accommodation bill.

If a bill (including, of course, a promissory note and a cheque) is given for a wagering or gaming debt, the winner cannot sue the loser upon it. It is also clear law that a bill given to secure a gaming or wagering debt is void in the hands of a holder for value with notice of the transaction (*Woolf v. Hamilton* (1808)). But if the bill is transferred for value to a third person who is unaware of the fact that it is connected with a gaming transaction, such third person can enforce payment. See *Hay v. Ayling* (1851); *Moulis v. Owen* (1907).

Wagering or
gaming debt
secured
by bill

Issuing a Bill. Just as a deed is of no legal effect until it has been delivered, so a bill of exchange does not bind any of the parties to it if, although complete in form, it comes into the hands of a person through some fraud before it has been delivered (sect. 21). For example, a bill complete in form may be stolen from the desk of the drawer. If there has been no delivery of the bill the drawer will not be liable upon it if it gets into circulation. But where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Necessity of
delivery

Acceptance. Where a bill has been drawn payable to or to the order of a third person, the drawer sends it to the payee or to the drawee. If the bill is sent to the former the payee forwards it to the drawee some time before it falls due. This is for the purpose of acceptance. A bill is said to be accepted when the drawee has signified his assent to the order of the drawer. This is generally done by the drawee's writing the word "accepted" across the face of the bill and adding his signature. As there is no special form necessary for a

Mode of
acceptance

bill itself, so there is no special word or words required to indicate acceptance, but the signature of the drawee must be there (sect. 17). The acceptance must not express that the drawee will perform his contract by any other means than the payment of money. It may be noticed that it has been held that what purported to be an endorsement was good although written upon the face of the bill. It may, therefore, be presumed that an acceptance written on the back of a bill would be valid (*Young v. Glover* (1857)). But it is not advisable in practice to try experiments with such documents as bills of exchange.

Necessity for
delivery

Acceptance, like every other contract on a bill of exchange, is incomplete and revocable until delivery of the instrument has been made in order to give effect to it.

When bill may
be accepted

A bill may be accepted (1) before it has been signed by the drawer or while otherwise incomplete, (2) when it is overdue or after it has been dishonoured by a previous refusal to accept, or by non-payment (sect. 18).

Who may
accept

The only person who can accept a bill of exchange is the drawee named therein, but an exception is made if an acceptance is *supra protest* for the honour of the drawee or any endorser.

When
presentment
for acceptance
should be
made

A bill should be presented for acceptance as soon as possible, because, if the acceptance is refused, the parties to the bill, other than the drawee, become liable at once, even though the bill has not matured. Also, if a bill is payable after sight presentment for acceptance is necessary within a reasonable time in order to fix the date of the maturity of the instrument. What is a reasonable time is a question of fact depending upon the particular circumstances of each case (sects. 39, 40).

The rules as to presentment for acceptance are given in sect. 41 of the Act, to which reference should be made.

General and
qualified
acceptances

An acceptance is either general or qualified. A general acceptance is one which assents without qualification to the order of the drawer. A qualified

acceptance in express terms varies the effect of the bill as drawn.

A qualified acceptance may be—

Kinds of
qualified
acceptance

(a) Conditional: that is, dependent upon a condition stated in the acceptance.

(b) Partial: that is, an acceptance to pay a part only of the amount for which the bill is drawn.

(c) Local: that is, an acceptance to pay at a particular place, and there only. But an acceptance in these words, "Accepted, payable at the London and Westminster Bank, Strand Branch," is not a qualified acceptance.

(d) Qualified as to time, when a bill drawn for three months is accepted for six months.

(e) An acceptance by some and not all of the drawees, when there are more than one.

If the acceptor of a bill desires to qualify his acceptance he must do so on the face of the bill in clear and unequivocal terms, so that any person taking the bill could not, if he acted reasonably, fail to understand that it was accepted subject to an express qualification (*Decroix v. Meyer* (1890)). The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance. If he takes a qualified acceptance without the express or implied consent of the drawer or an endorser, such drawer or endorser is discharged from his liability on the bill (sect. 44).

Effect of
qualified
acceptance

After protest for non-acceptance (see page 279, *post*), any person who is not a party already liable on a bill may, provided the bill is not overdue, with the consent of the holder, accept the bill *supra* protest for the honour of any party liable upon it or for the honour of the person for whose account the bill is drawn. A bill may be accepted for honour for part only of the sum for which it is drawn (sect. 65 (2)).

Acceptance
for honour
supra
protest

An acceptance for honour *supra* protest must be written on the bill and indicate that it is an acceptance for honour, and must be signed by the acceptor for honour. Where the acceptance does not expressly state

Form of
acceptance
for honour

for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

Liability of
acceptor for
honour

The acceptor for honour engages that he will on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided that it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. He is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Negotiation. It is not necessary to refer to the functions which bills of exchange fulfil in commerce. But it is important that the reader should have a clear idea of how bills are negotiated.

How
negotiation
effected

The negotiation of a bill signifies its transfer, and unless the bill contains words prohibiting its transfer, any holder may so deal with it. The method of transfer depends upon whether the bill is payable to order or to bearer. If the former it must be endorsed before it can be negotiated, by the person to whose order it is made payable; if the latter, no endorsement is necessary. But it is always advisable to secure the endorsement of a transferor, so as to make him liable as a party to the bill in case it is dishonoured. A transferor by delivery merely warrants to his immediate transferee, if the transferee takes for value, that the bill is what it purports to be, that he has a right to transfer it, that at the time of transfer he was not aware of any fact which rendered the bill valueless (sect. 58).

Endorsement

"In blank"

"Special"

When a transferor simply writes his name on the back of a bill he is said to endorse it "in blank." If he endorses it in some such manner as the following, "Pay X Y or order," the bill is said to be "specially endorsed." The difference between these two kinds of endorsement is this. In the former case the transferee can negotiate the bill by mere delivery, whereas in the latter the signature of X Y is absolutely necessary before any further transfer can take place. If other words are added, such as "Pay X Y only," the bill is said to be "restrictively endorsed," and no further negotiation of

the bill is possible. It is always possible for a holder to convert a blank into a special endorsement. This is done by writing above the endorser's signature a direction to pay the bill to, or to the order of, himself or of some other person (sect. 34, subsect. (4)). A restrictive endorsement cannot be changed. By the use of the words *sans recours* (without recourse), the transferor excludes his personal liability on the bill. A transferee may very naturally object to taking such a bill.

Sans recours

Bills of exchange pass through so many hands in modern commercial transactions that the number of transfers may be very considerable, and the space on the back of the bill insufficient to contain all the names of the intended endorsers. A slip of paper is then attached to the bill to receive the further endorsements. This slip is called an "allonge."

"Allonge"

"Holder in Due Course." When a bill has been duly drawn and accepted it is handed to the payee. Sometimes, as has been stated above, the bill is handed to the payee before it has been accepted. The payee is the first holder of the bill, but as it is not negotiated to him he is not a holder in due course (*Jones (R. E.) v. Waring & Gillow* (1926). By the Act of 1882 (sect. 29) the holder in due course is defined as "a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely—

Who is holder in due course

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact ;

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

A holder in due course holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and he may enforce payment against all parties liable on the bill (sect. 38).

Rights and powers of holder in due course

Every holder is *prima facie* deemed to be a holder in due course. If, however, it is admitted in an action on

Holder is *prima facie* a holder in due course

a bill that the acceptance, issue, or subsequent negotiation is affected with fraud, duress, or force and fear, or illegality, then the burden of proof is shifted and the holder must prove that since the alleged fraud or illegality, value has in good faith been given for the bill (sect. 30 (2)).

A holder, however, who is not a holder in due course, may sue on the bill in his own name, and where his title is defective if he negotiates the bill to a holder in due course that holder obtains a good and complete title to the bill, and if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

Forgery. The holder in due course has been defined, and it has been pointed out that his position is unaffected by any defects in the title of any prior party to the bill, even though such prior party may have stolen the bill. But no title can be made through a forgery. A forged or unauthorised signature placed upon a bill is wholly inoperative (sect. 24). Thus, if a bill is made payable to the order of a particular person, or is specially endorsed to him, and another person forges his endorsement, a subsequent transferee has no right as a holder in due course, even though he took the bill without any knowledge of the forgery and gave value for it. The forgery of an endorsement is not a mere defect of title. Even a banker is responsible to his customer if he pays under a forged endorsement, unless it is a cheque, a bill payable on demand drawn on the banker (sect. 60). A specially endorses a bill to B. It is stolen before delivery to B, and B's endorsement in blank is forged on it. It comes into the hands of C, who gets his bankers to present it for payment. They receive payment, credit C with the amount, and C withdraws the whole sum from the bank. A can recover the amount of the bill from the bankers in an action for money had and received, or for conversion of the bill (*Arnold v. Cheque Bank* (1876). Cf. *Bank of England v. Vagliano* (1891)). By reason of this liability to loss in the case of forgery, a banker ought always to make

Effect of
forgery on
title

special arrangements with his customers when bills are made payable at his bank.

Although a transferee acquires no rights on a bill which bears a forged endorsement, he can demand repayment of the amount which he has himself paid for the bill from his transferor, or from a party who has endorsed the bill subsequent to the forgery.

Rights of transferee under bill bearing forged endorsement

Alteration of Bill. By sect. 64 of the Act a bill is avoided where it has been materially altered without the assent of all parties liable on the instrument, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers. But if the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and enforce payment according to its original tenor.

Material alteration

An excellent illustration of the law on this point is provided by the case of *Scholfield v. Earl of Lonsdale* (1896). A bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary, and with spaces left vacant. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned the bill into one for £3,500, the stamp being sufficient to cover this last-named amount. The bill got into the hands of a *bona fide* holder for value who sued the acceptor for the total amount. The acceptor admitted his liability as to £500, but denied the rest. In this contention he was held to be correct. It was also decided that the acceptor is under no duty to take precautions against fraudulent alterations in the bill after acceptance. There is no privity of contract between him and subsequent parties to the bill.

Subsect. (2) of sect. 64 gives instances of what are material alterations: alteration of the date, of the sum payable, of the time of payment, of the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. But these are not exhaustive. Many cases are to be found in which the question of materiality or

immateriality has been discussed, and it appears that, speaking broadly, an alteration will be held to be material which prejudices the position of a party to the bill in any particular.

Mutilation

Accidental mutilation of a bill does not amount to a material alteration within the section. If it has been torn to such an extent as to suggest that it was intended to cancel it, the drawer may be liable if he pays it and cancellation was intended. In *Hong Kong & Shanghai Banking Corporation v. Lo Lee Shi* (1928), a bank was held liable to pay a banknote that had been accidentally mutilated and was patched together from fragments.

The addition of the words "per X" between the name of the payee and the words "or order" was held to be a material alteration in *Slingsby v. District Bank* (1932).

Where a bill was drawn in London and on the face "London" was altered to "Deisslingen," the court held that the bill was void within the section as the alteration was material, purporting to convert an inland bill into a foreign bill (*Koch v. Dicks* (1932)).

Acceptor

Drawer

Endorser

Liabilities of Parties. The holder of the bill is the person entitled to payment upon the maturity of the instrument. Subject to what has been stated in cases of forgery and material alteration the acceptor is the person who is primarily liable to pay. If he refuses to do so and the bill is dishonoured, the drawer and each of the endorsers is liable, and the holder can take proceedings against whomsoever he chooses, provided that the proper notices of dishonour have been given. If an endorser pays the amount of the bill and receives the bill from the holder, he can in turn sue the drawer and any of the previous endorsers. It is for the purpose of keeping these remedies alive that the law lays such great stress upon the due observance of the rules as to notice of dishonour.

In order to facilitate the course of proceedings in an action upon a bill of exchange, the Act has set out in sects. 53-58 the full nature of the liabilities undertaken by the acceptor, the drawer, and the endorser of a bill,

and has indicated what are the estoppels which bind each of them. It will be obvious upon a little consideration that an action at law on a bill might be almost interminable without these estoppels.

Notice of Dishonour. When a drawee refuses to accept a bill, or when, having accepted, he refuses on due presentation to pay the amount of it at maturity, the bill is said to be dishonoured. The holder must at once give notice of the dishonour to all parties to the bill whom he wishes to hold responsible for the default of the drawee. This notice is generally given in writing, and should be sent immediately.

In the absence of special circumstances the following are the rules as to the time for giving notice of dishonour—

Rules as to
time for
giving notice

(a) Where the person giving and the person to receive notice reside in the same place, the notice must be given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice must be sent off on the day after the dishonour of the bill, if there is a post at a convenient hour on that day, and if there is no such post on that day then by the next post thereafter.

Each person to whom notice of dishonour is given has the same time in which to give notice to any parties to the bill whom he desires to make responsible.

The above is all the knowledge that is required for dealing practically with cases where notice of dishonour is necessary to be given. The Act, however, provides for special circumstances, and gives numerous instances in which notice of dishonour may be dispensed with. See sects. 45-50.

Protest. When a bill is dishonoured either by non-acceptance or non-payment, it may be handed to a notary public, who by presenting it again and giving his certificate, provides evidence of dishonour. With the exception of those cases in which acceptance or payment for honour is desired, protest is optional as

Necessity for
protest

far as inland bills are concerned ; but unless a foreign bill is protested the drawer and the endorsers are discharged.

There are certain excuses allowed for non-protest, which are the same as those which dispense with notice of dishonour (sect. 51, subsect. (9)).

Contents of
protest

The protest must contain a copy of the bill, must be signed by the notary who makes it, and must specify the person at whose request the bill is protested. The place and date of protest, the cause of it, the nature of the demand made and the answer given in reply must be set out. If a notary public is not available the protest may be signed by a householder in the same manner in the presence of two witnesses.

Time for
protest

As time is of importance so as to fix liability, the bill ought to be protested on the day of dishonour. If, however, the bill has been "noted" in due course, it may be protested afterwards as of the date of noting. By sect. 51, subsect. (4), as amended by sect. 1 of the Bills of Exchange (Time of Noting) Act, 1917 (7 & 8 Geo. 5, c. 48), when a bill is noted or protested, it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day.

Noting

Noting consists of the making of a minute of the bill to the effect that acceptance or payment was refused. This is done by the notary who initials the minute and takes particulars in the register. If the protest is later extended it is drawn up from the particulars in the register. A ticket is usually attached to the bill bearing the reason for non-payment or non-acceptance.

1. Payment

Discharge of Bill. The most obvious and general method of discharging or extinguishing the right of action upon a bill is payment by the acceptor according to the tenor of the instrument. This payment always operates as a discharge if made at or after the maturity of the bill to the holder in good faith and without notice that his title is defective. Payment by the drawer or an endorser does not act as a discharge. The former may sue the acceptor if he takes up the bill, and the latter may pursue his remedies against the acceptor,

the drawer, or any prior endorsers, or he may strike out his own endorsement and all endorsements subsequent thereto and again negotiate the bill. In the case of an accommodation bill, however, the bill is discharged when payment is made by any party to it who has been accommodated (sect. 59). Upon receiving payment the holder is bound to deliver up the bill to the party who has paid it (sect. 52, subsect. (4)).

But a discharge can be effected in other ways. The bill may, in the course of its negotiation, get into the hands of the acceptor as a holder. If this happens at the time when or after payment is due the bill is discharged (sect. 61), provided the acceptor receives the bill in his own right, that is, by a right not subject to that of another person, but good against all the world. This is well illustrated by the case of *Nash v. De Freville* (1900). There the defendant gave three promissory notes to cover his indebtedness to the payee, and subsequently two more notes, in substitution for the first three and to cover further advances. All the notes were payable on demand and were given on the understanding that they should not be negotiated. The payee endorsed all five notes generally to the plaintiffs. After the payee had so negotiated the notes the defendant paid to him the amount due on the last two notes, but the defendant was not aware that the payee had parted with the notes, and did not ask for or receive any of them from him. At a later date the payee obtained the five notes from the plaintiffs by fraud, and handed them to the defendant. It was held that the defendant, when he received back the notes, did not become a holder for value, since the previous satisfaction of the notes by him was not a consideration given by him when he received back the notes, and that as they were then overdue he acquired no better title than the payee had while they were in his hands, and that the plaintiffs, being entitled to disaffirm the transactions between themselves and the payee, by which the latter obtained possession of the notes, could recover in the action.

2 Acceptor
becoming
holder

3 Renunciation of rights against acceptor

When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor this acts as a discharge of the bill (sect. 62). At common law the renunciation was good if made orally and even without consideration (*Foster v. Dauber* (1851)). Now by the Act the renunciation must be in writing unless the bill is delivered up to the acceptor, otherwise the bill might get into circulation again, and renunciation would be of no avail against a holder in due course who had no notice of the renunciation. If the acceptor is dead the delivery of the bill to his executors or administrators acts as a discharge, but this is not so if the bill is delivered to the devisee of the acceptor (*Edwards v. Walters* (1896)).

4 Cancellation by holder

Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged (sect. 63). An unintentional cancellation is of no effect. Any party to a bill may be discharged by the intentional cancellation of his signature by the holder or his agent, and in such a case any endorser who would have had a right of recourse against the party whose signature has been cancelled is also discharged.

5 Material alteration of bill

Where a bill or acceptance is materially altered without the assent of all parties liable on the bill it is avoided except against a party who has himself made, authorised, or assented to the alteration and subsequent endorsers (sect. 64). See further, page 277, *ante*.

Lost Instruments. The loss of a bill of exchange does not necessarily entail the loss of a right to recover the amount thereof. If a holder loses a bill before it is overdue, the drawer may be compelled to give him another bill of the same tenor. The holder must, however, indemnify the drawer against the chances of the original bill's turning up and being put into circulation. The court may, in any action or proceedings on a bill, order that the loss of the instrument shall not be set up, provided a satisfactory indemnity has been given (sects. 69, 70).

CHEQUES. A cheque is a bill of exchange drawn on a banker payable on demand (sect. 73). Definition

The rules applicable to bills of exchange payable on demand apply to cheques, except in so far as is otherwise provided by the Act of 1882 (sect. 73). Also by sect. 17 of the Revenue Act, 1883 (46 & 47 Vict., c. 55), the provisions of sects. 76-82 of the Bills of Exchange Act, 1882 (those dealing with crossed cheques) apply to "any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque." A cheque payable to the order of a fictitious or of a non-existing payee may be treated as one payable to bearer. See and compare the cases of *Lutton v. Attenborough* (1897); *Vinden v. Hughes* (1905); *North and South Wales Bank v. Macbeth* (1908).

But although the general rules governing bills of exchange are applicable to cheques, there are a few points of difference which require special notice. (1) A bill of exchange must be accepted before the acceptor is liable upon it. A cheque is never accepted by a banker, and therefore the banker is never liable to the holder of the cheque for refusing payment of it. If there is any remedy it is for breach of contract between the customer and his banker (*Schroder v. Central Bank of London* (1876)). (2) A bill must be duly presented for payment or the drawer will be discharged. The drawer of a cheque is not discharged by delay in presenting it for payment, unless, through the delay, the position of the drawer has been injured by the failure of the bank, when he had sufficient money deposited or the right to overdraw to meet the amount of the cheque. In such a case the holder must prove for the amount of the cheque in the winding up or bankruptcy of the bank. The drawer is discharged to the extent of the actual damage that he suffers through the delay (sect. 74). (3) Notice of dishonour to the drawer is not necessary if a cheque is not met (sect. 50 (2)).

Differences
between
cheques and
bills of
exchange

1 Cheque
is never
accepted

2 Delay in
presenting
cheque
generally
immaterial

To claim the protection of resorting to the drawer in case a cheque is not met, the presentation at the bank must be within a reasonable time. What is a reasonable time is a question of fact depending upon the peculiar circumstances of each case. Sect. 74, subsect. (2) seems to relax the stringency of the old common law as to presentment for payment, but it is well to bear in mind the rules, which are as follows.

(1) If the person who receives a cheque and the banker on whom it is drawn are in the same place, the cheque should be presented for payment on the day after it is received.

(2) If the person who receives the cheque and the banker on whom it is drawn are in different places, the cheque should be forwarded for presentation on the day after it is received, and the agent appointed to present should present it on the day after its receipt by him.

(3) In the computation of time non-business days are excluded. When a cheque is crossed any delay caused by presenting the cheque pursuant to the crossing is probably excused.

An illustration of the effect of what has just been stated may be given by the following example. A draws a cheque for £50 on his banker. The cheque is not presented within a reasonable time. A short time later the banker fails and the drawer of the cheque has a sum of more than £50 standing to his credit at the bank. The drawer of the cheque is discharged and the holder must prove for £50 in the banker's bankruptcy. If the drawer has not sufficient funds in the bank, but is allowed to overdraw to an amount which would place his balance at a sum exceeding £50, the drawer would still be discharged, but the holder could not prove in the bankruptcy.

Custom of
banks as to
payment of
old cheques

Although a debt is not extinguished by delay in presenting a cheque, unless the claim is barred by the Statute of Limitations, it is the custom of bankers not to pay cheques which are presented after a certain period has elapsed since their ostensible date of issue.

With some banks the period is six months, whilst with others it is twelve months.

Banker and Customer. The relationship of a banker to his customer is basically that of a debtor to his creditor, and to this is added the obligation of the banker to repay the debt to the customer as it is called for by the customer (*Foley v. Hill* (1848)). The banker is not liable to an action on the debt on current account until a demand has been made (*Joachimson v. Swiss Bank Corpn.* (1921)). The presentation of a cheque constitutes a demand. The banker is in no respects a trustee for the customer in respect of the money paid into the bank, otherwise he would be responsible to the customer and would have to account for all profits made by him in the use of the money deposited.

Nature of
relationship

The Statute of Limitations applies to the debt between a banker and his customer as well as to other debts. But, in view of the decision in *Joachimson v. Swiss Bank Corpn.*, *supra*, it appears that the statute cannot run in favour of a banker on the credit balance of a current account because no cause of action against the banker arises until demand has been made. If, on the other hand, money is on deposit and is not operated upon in any way and no interest is credited for more than six years, it becomes statute-barred (*Pott v. Clegg* (1849)). It is not, however, the practice of bankers to insist upon their legal rights under the Statute of Limitations.

Application of
Statute of
Limitations

There is an implied contract between the parties that the banker will honour the cheques of his customer as long as there is a balance in his favour; and that he will also honour them to the extent of any overdraft agreed upon. A banker who fails to honour his customers' cheques, under the above conditions, is liable to an action for damages (*Marzetti v. Williams* (1830)). Lord Shaw, in *London Joint Stock Bank, Ltd. v. Macmillan & Arthur* (1918), said: "If the cheque do not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists

Duty of
banker to
honour
customer's
cheques

between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation."

Cheque for
amount
in excess of
funds

A banker is not bound to pay part of a cheque. Thus, if the balance of the customer is £49, and a cheque is drawn by him for £50, the banker should refuse payment. Part of the amount of a cheque is clearly not sufficient to meet it (*Carew v. Duckworth* (1869)). It is sometimes supposed that the payee or holder of a cheque has a right in such a case to pay in the difference between the amount of the cheque and the balance standing to the drawer's credit at the bank, so as to secure the sum that is there. Thus, in the example just given, the holder would receive the £49 in the bank if he first paid in £1, so as to make the balance equal to £50. Such a thing is rarely, if ever, done in practice because it cannot but be regarded as improper, as it is difficult to see how the holder of the cheque could ascertain the amount to the drawer's credit without being informed by the bank. The two persons who know of the true state of the account at a bank are the banker and the customer. It is not easy to understand why a customer should draw a cheque for an amount which he knows will not be met and tell the holder of the cheque of the fact, and it is difficult to believe that a banker can often be guilty of a breach of his obligation not to disclose his customer's account

Determination
of duty and
authority to
pay cheque

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined *inter alia* by—

- (a) Countermand of payment ;
- (b) Notice of the customer's death (Bills of Exchange Act, sect. 75);
- (c) Notice of an available act of bankruptcy (Bankruptcy Act, 1914, sect. 45 and 46). But, as to (b), when a firm consists of several members, the death of one or more of the partners does not revoke the authority of the surviving partners or partner to draw cheques on the firm's account (*Backhouse v. Charlton* (1878)).

(d) Noting the drawer's lunacy.

(e) Operation of law, such as service of a garnishee order or an injunction.

If a banker in error honours a cheque of a customer who has no assets to meet it, he cannot reclaim the money from the payee. There has been a payment by mistake, but the mistake did not arise out of any transactions between the banker and the payee, but out of those between the banker and his customer. The banker may, however, sue his customer as for money paid at the customer's request and for the customer's benefit. See *Chambers v. Miller* (1862).

Payment by
banker where
customer has
no assets

Forgery. When a cheque has been drawn and handed to the payee, it is presented in due course at the bank named for payment. The banker must see that the date due has arrived, and that the cheque is regularly drawn. If it is a cheque payable to bearer it needs no endorsement. If, on the other hand, it is made payable to a specified person, or to a specified person or order, the cheque must be endorsed in the name of the person to whom or to whose order it is made payable.

If a cheque is drawn and the signature of the drawer is a forgery, no one can obtain a title to the document (sect. 24). Even a banker can claim no protection if he pays a cheque under a forged signature of the drawer, as he pays without an authority.

Name of
drawer
forged

Duty of
banker to
know
customer's
signature

But with respect to endorsements it is otherwise. A tradesman who takes a cheque and changes it to oblige a customer may be compelled to refund the amount to the holder or person entitled if the cheque bears a forged endorsement because the customer can have no title to it. He acts at his own risk. But a banker is protected by the statute (sect. 60). The banker must know the signature of the drawer, and act or refuse to act upon the order of his customer at his peril, but he cannot be expected to know the payee or his signature. No liability will rest upon the banker for paying a cheque which bears a forged endorsement if he acts in good faith (i.e. honestly), and in the

Forged
endorsements

ordinary course of business. To cash a crossed cheque which bears a forged endorsement over the counter of the bank except to another banker would be a clear case of not acting in the ordinary course of business, and a banker who acted in that manner would not be able to debit his customer with the amount of the cheque.

Negligence of
customer

A banker should refuse payment of a cheque which appears to have been materially altered, otherwise he may have to bear any loss which arises. But if the customer has drawn a cheque so negligently as to facilitate an alteration or a forgery, he cannot hold the banker responsible if the latter pays. It has been pointed out in the case of *Scholfeld v. Earl of Londesborough* (1896) that the rule is different for bills of exchange. There is no privity of contract between the drawee of a bill and a subsequent holder for value. It would appear that the gross carelessness of the customer in drawing a cheque, by which a fraudulent alteration is made a matter of case, is sufficient to excuse a banker who pays the altered amount instead of that originally inserted. The drawer is in fact estopped by his conduct. The facts of *Young v. Grote* (1827) illustrate this. There a customer of a banker gave his wife certain cheques signed by himself, but with blanks left for the sums, telling her to fill them up according to the necessities of business. She filled one in such a manner that a fraudulent clerk had no difficulty in changing the amount of £50 2s. into £350 2s. The alteration was not apparent, and the bank paid the cheque. It was held that the loss must fall on the customer.

The authority of the case of *Young v. Grote* was much shaken by the decision of the Privy Council in the case of *Colonial Bank of Australasia v. Marshall* (1906), in which it was held that mere carelessness in the manner of drawing a cheque was not conclusive proof of negligence. The decisions of the Privy Council, however, are not binding upon the House of Lords, and, consequently, the whole question of negligence was able to

be brought up and discussed in the case of **London Joint Stock Bank, Ltd. v. Macmillan & Arthur** (1918), and the authority of *Young v. Grote* was completely restored. A cheque drawn by a customer is, in point of fact, a mandate to the banker to pay the amount according to the tenor of the cheque, but the customer is bound to exercise all reasonable care to prevent the banker from being misled. If he draws a cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and is responsible for any loss suffered by the banker as a natural and direct consequence of this breach of duty. It is no answer on the part of the customer to say that the person who carried through the fraud was one in whom he had the fullest confidence.

In *Greenwood v. Martins Bank, Ltd.* (1932) the plaintiff's wife had drawn a series of forged cheques on his account. The plaintiff forbore to inform the bank for a long time and when he eventually did inform the bank his wife committed suicide. The court held, in an action by the plaintiff to recover the money from the bank, that it was his duty to inform the bank immediately he discovered the forgery and that he was estopped from recovering the money because the bank had lost through his delay the right to take action against the wife.

Estoppel of
customer

Crossed Cheques. To minimise the risks run through loss or forgery, it has become the common practice, when paying accounts, for the drawer of the cheque to "cross" it, that is, to draw two parallel transverse lines across its face, and to write the words "and Co." between them. The two parallel lines alone are sufficient (sect. 76). A cheque of this kind must not be paid over the counter of a bank, unless presented by another bank (sect. 79). And if, in addition, there is added the name of a particular bank, then the presentation must be made through that bank. These crossings are respectively called "general" and "special."

The crossing is a material part of the cheque. If not crossed by the drawer, the crossing may be made,

Who may cross

either generally or specially, by the holder or by a banker to whom it is sent for collection. Only a banker, however, can re-cross a specially crossed cheque to another banker for collection (sect. 77, 79). It sometimes happens that the drawer of a cheque after crossing it is requested by the payee to make the cheque what is called an "open" one. This is done by striking out the crossing and writing the words "pay cash." There is nothing in the Act to sanction this practice. The remedy in such a case is to comply with the rule laid down in 1912 by the Committee of London Clearing Bankers to the effect that such a cheque must not be paid except when the "opening" bears the full signature of the drawer and is presented by him or his known agent.

Duty to pay
according
to crossing

If a banker on whom a cheque is drawn pays the cheque in a manner otherwise than according to the crossing, he is liable to the true owner of the cheque so paid (sect. 79).

Protection
of banker

Where, however, a banker on whom a crossed cheque is drawn in *good faith and without negligence*, pays it in accordance with the crossing, the banker paying the cheque, and (if the cheque has come into the hands of the payee) the drawer are respectively entitled to the same rights and to be placed in the same position as if payment of the cheque had been made to the true owner thereof (sect. 80).

"Not
negotiable"

The mere crossing of a cheque does not affect the negotiability of the instrument. The holder in due course has a perfect title to it. But the character of negotiability may be taken away if the words "not negotiable" are added. The holder of such a cheque has no better title to it than the person from whom he took it. Thus, for example, if a cheque marked "not negotiable" is stolen from the payee or a subsequent holder, and the thief transfers it for value to another person, the transferee has no right to retain it. He holds it affected with the same taint as the thief did, and he must restore it, on demand, to the rightful owner.

It is not unusual for cheques to be crossed "account payee," or "account of J. B.," or some similar words. Strictly this is not part of the crossing, nor is there any provision in the Act of 1882 for the use of such words. Nevertheless, the words have at various times received judicial construction, and it is well established that their addition to a cheque amounts to a direction to the receiving banker that the drawer desires to pay the cheque into that bank which keeps the account of the payee. To disregard such a direction would probably amount to negligence (*Bevan v. National Bank, Ltd.* (1907)), but see *Importers Co., Ltd. v Westminster Bank, Ltd.* (1927) as to the liability of a bank which is merely clearing a cheque so marked for another bank.

"Account payee"

The addition of the words "account payee" does not affect the negotiability of the cheque, but it puts the bank on inquiry when it is paid into the account of a person who is not the named payee (*House Property Co. v. London, County & Westminster Bank* (1915); *Underwood v. Bank of Liverpool* (1924)).

In *Ladbroke & Co. v. Todd* (1914), a banker who permitted a person to open an account with a cheque crossed "account payee only," and to collect the money for it without making any inquiries, was held guilty of negligence towards the drawer of the cheque.

Several cases of great importance have been decided upon sect. 82 of the Act, which deals with the liability of a banker who collects a crossed cheque. The section is as follows—

Protection to
collecting
banker

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

But for this section, a banker, like any other person, who dealt with a cheque to which he had no title would be liable to an action for conversion. As the protection is great the construction of the section is very stringent.

Requisites for protection

The document dealt with must satisfy the definition of a cheque. In *Slingsby v. Westminster Bank* (1931), where a warrant for payment of interest on five per cent War Stock was crossed "& Co., Not Negotiable," and contained directions by the Chief Accountant of the Bank of England to the cashiers of the Bank of England to pay a specified sum to the order of a named person, the court held that the warrant was a crossed cheque and that the banker was entitled to the protection of sect. 82 of the Act.

Negligence

The banker must act in good faith and without negligence. The rule as to negligence was laid down with great clearness in *Lloyds Bank v. Chartered Bank of India, Australia, and China* (1929). The duty of the bank to the true owners of a cheque is: (1) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own, and (2) to provide a reasonable and competent staff to carry out this duty. Examples of "negligence" may briefly be given as follows—

(a) Collection without adequate enquiry for a customer of a cheque payable to the customer's employers or to a body to whom the customer stands in fiduciary relationship (see *Savory & Co. v. Lloyds Bank* (1932)).

(b) Collection of an instrument irregularly drawn or endorsed.

(c) Collection of a cheque marked "account payee" for someone other than the payee.

The payment must be received on behalf of a customer.

Who is a "customer"

It is not always easy to determine who is a customer, and the Act provides no assistance on the point. In *Great Western Railway Co. v. London & County Banking Co.* (1901), it was held that to make a person a customer of a bank within sect. 82 of the Act there must exist some sort of account, either a current or a deposit account, or there must be some similar relationship. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques

up to the amount standing to his credit is a customer, irrespective of whether his connection is of long or short duration (*Commissioners of Taxation v. English, Scottish & Australian Bank, Ltd.* (1920)). Another bank for whom the bank seeking the protection of sect. 82 collects cheques and receives payment is a customer of the bank (*Importers Co. v. Westminster Bank* (1927)).

An example of the strict construction placed upon the provisions of sect. 82 is to be found in the decisions of the court that payment was not received on behalf of a customer within the meaning of that section if the bank received payment as a holder for value. In *Ex parte Richdale* (1882) it was held that when a customer hands a cheque to his banker, intending that it should at once be placed to his credit, and it is so placed, the bankers become holders of the cheque for value. It was further definitely decided in *Capital & Counties Bank, Ltd. v. Gordon* (1903) that the act of crediting the cheques by the banker gave the customer the right to draw against them, so constituting the banker a holder for value, and excluding him from the protection of sect. 82. As a result of the Gordon case, which made the position of collecting banks extremely difficult, the bankers obtained an amendment of sect. 82 which would bring them within its provisions. By the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), it is provided that "a banker receives payment of a crossed cheque for a customer within the meaning of sect. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

To be effective in protecting a banker under sect. 82, the cheque must be crossed before it is paid in to the bank. If the cheque is paid in uncrossed and a clerk crosses it with a rubber stamp, this merely identifies the source of the remittance; it does not give the banker protection (*Akrokerri Atlantic Mines v. Economic Bank* (1904)).

Post-dated Cheques. It has been doubted whether a

post-dated cheque is valid, if it exceeds £10, and a twopenny stamp is used. Since sect. 13 allows post-dating, there seems to be no reason for holding such a cheque as void *ab initio*. But it is probable that a drawer may render himself liable to penalties under the Stamp Act, 1891, if such a cheque is allowed to get into circulation, or to be negotiated. No liability is incurred if a post-dated cheque is drawn and then held by the payee until the date of payment arrives. For a collateral purpose a post-dated cheque was allowed to be put in evidence in the case of *Royal Bank of Scotland v. Tottenham* (1894).

Property in Paid Cheques. After payment has been made a cheque becomes the property of the drawer, but the paying banker is entitled to retain it as a voucher until his account with his customer has been settled.

Chequelet. An interesting attempt was made in 1927 by one of the banks to issue to its customers a "book of receipts" which were available for the payment of sums of less than £2, and so would not require to be stamped. The receipt was used in the same way as a cheque; it merely acknowledged the receipt of a sum from the bank, which sum was paid on presentation of the receipt. *Rowlatt, J.*, however, in *Midland Bank, Ltd. v. Inland Revenue Commissioners* (1927), held that the document was liable to stamp duty as being a document entitling a person to a payment by another person. It was not a receipt until it was used as such.

Definition

PROMISSORY NOTES. "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer" (sect. 83).

An instrument in the form of a note, and made payable to the order of the maker, is not a note within the meaning of the section unless and until it has been endorsed by the maker.

A promissory note is usually drawn thus—

London, 1st November, 19..

Form

£75.

Three months after date I promise to pay to Mr. John Roberts or order the sum of seventy-five pounds, for value received.

James Smith.

The note may be drawn for any time, or on demand, and may be made payable to bearer, instead of to order, as a bill of exchange or a cheque.

James Smith is called the "maker" and John Roberts the "payee" of the promissory note. It is transferable like a bill of exchange, and may be endorsed in the same manner. The maker is the person primarily liable upon the instrument, and in default each of the endorsers can be sued. But no endorser is liable until the note has been presented to the maker for payment and payment has been refused.

Parties

A promissory note is inchoate or incomplete until it has been delivered to the payee or bearer (sect. 84).

Delivery

A note is not invalid because it contains a pledge of collateral security with authority to sell or dispose of the same. Thus, in *Kirkwood v. Carroll* (1903), it was held that a joint and several note for payment of £125 by instalments, the whole to become due on default in payment of any one instalment, and "no time given to, or security taken from, or composition or arrangement entered into with either party hereto" to "prejudice the rights of the holder to proceed against any other party" was a valid promissory note. This overruled the decision which had been previously given in *Kirkwood v. Smith* (1896).

Pledge of collateral security

If a note is worded "I promise" and signed by two or more persons it is called a joint and several note, and each of the parties who signs the note is liable to be sued by the holder if payment is not made in due course (sect. 85).

Joint and several note

The note must in some cases be presented for payment with due formalities (sect. 87), and it must not

Presentation

be allowed to remain unpresented for an unreasonable time (sect. 86). The liability of the maker of a promissory note and the estoppels binding him are given in sect. 88, which provides that he engages that he will pay it according to its tenor and is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

Application
of Bills of
Exchange
Act

Subject to the modifications of Part 4 of the Act (sects. 83–89) all the provisions of the Act applicable to bills of exchange are also applied to promissory notes with the exception of (a) presentment for acceptance, (b) acceptance, (c) acceptance *supra protest*, (d) bills in a set (sect. 89).

Stamp

A promissory note is stamped as a bill of exchange, but the duty is always an *ad valorem* one (*Oettinger v. Cohn* (1908)).

BANK NOTES. These are promissory notes made by a banker and payable on demand. As the result of the operation of the Bank Charter Act, 1844, and the amalgamation of various banks the Bank of England has now a monopoly of issuing notes in England and Wales. The monopoly was at one time shared with banks which were established before 1844, subject to certain restrictions and conditions.

Bank of England notes, which are issued for sums of 10s., £1, £5, and upwards, form part of the ordinary currency of the kingdom, and are legal tender. (Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 13).)

A bank note differs from an ordinary promissory note in that it can be reissued after payment. But it is not the practice of the Bank of England to reissue any of its notes.

CHAPTER XIV

CARRIAGE

THE contract of carriage is one of the utmost importance since the carriage of goods must play a very great part in the commercial life of an industrial community. The law upon the subject was fixed at an early date, and the obligations laid upon carriers were of an extremely onerous kind. It appears very probable that the liability of the carrier was purposely made as heavy as possible, owing to the fact that in the days of transit by road there were great inducements for carriers to collude with highwaymen and to allow their vehicles to be ransacked (*Lane v. Cotton* (1710)). But with the advance of business, the improvement of locomotion, and a more certain administration of the criminal law it was felt that the burdens imposed by the common law should be lightened, and since 1850 various statutes have been passed for that purpose. These statutes will be noticed so far as they affect the ordinary liabilities of carriers by land and by sea.

The contract of carriage

There are three kinds of carriers: carriers without hire, that is, persons who undertake to carry goods gratuitously; private carriers, and common carriers. With the first class we are not concerned here. It is sufficient to state that the law imposes upon them the obligation only of slight diligence. They are, however, liable for gross negligence (*Coggs v. Bernard* (1704)).

Kinds of carriers

Private Carriers. A private carrier is any person carrying for hire who does not come within the definition of a common carrier.

Who is a private carrier?

Such a person is bound to use ordinary diligence and a reasonable amount of skill. It is a question of fact whether ordinary diligence has been used and will depend frequently upon the nature of the property carried. A private carrier is not responsible for losses not occasioned by the ordinary negligence of himself or his servants. Private carriers may, of course,

Duties of private carrier

contract for greater or more restricted responsibilities than the law implies.

Who is a
common
carrier?

Railway
companies

Persons who
convey
passengers
only

Person plying
for hire
within one
town

Person in
casual
employment

Common Carriers. A common carrier is a person who undertakes as his particular business the carriage for hire of goods, from place to place, of any persons who choose to employ him. Such is the person who conveys goods from town to town or from country to country by carriages, barges, ships, or aircraft (see *Coggs v. Bernard* (1704); *Maving v. Todd* (1815); *Laveroni v. Drury* (1852); *Liver Alkali Co. v. Johnson* (1874); *Watkins v. Cottell* (1916); *Aslan v. Imperial Airways, Ltd.* (1933)). Railway companies are only common carriers in so far as they carry goods by profession (*Johnson v. Midland Railway Co.* (1849); *Hare v. London & North Western Railway Co.* (1861)), and they are not liable as common carriers of passengers independently of negligence (*East Indian Railway Co. v. Kahdas Mukerjee* (1901)).

It has been held that a person who conveys passengers only is not a common carrier (*Christie v. Griggs* (1809)), and the same is true of a person who plies for hire in a town and does not travel from one district to another (*Brind v. Dale* (1837)). Since it is a part of the definition of a common carrier that he must be a person who by profession carries goods for hire, it is obvious that if the carriage is a mere casual employment the person engaged is bound by a contract other than that which applies to common carriers in general, and is only responsible, *prima facie*, for negligence.

The real test is whether the person to be charged with liability as a common carrier has held out that as long as he has room he will carry the goods of any person who will bring them to be carried (*Ingate v. Christie* (1850); *Nugent v. Smith* (1876)). Whether he does so hold himself out is a question of fact (*Tamvaco v. Timothy Green* (1882)). A man is not a common carrier if he reserves the right to refuse to accept goods (*Belfast Ropework Co. v. Bushell* (1918)).

Bound to
carry goods

Duties of Common Carriers. A common carrier is bound at common law to receive and to carry all goods

of any person who offers them for that purpose, and who is willing to pay the usual and proper charges made for the same (*Pickford v. Grand Junction Railway Co.* (1841)). In the absence of a special contract he must carry by the ordinary or reasonable route, though not necessarily the shortest, even though he is entitled by statute to charge a mileage rate (*Myers v. London & South Western Railway Co.* (1869)). He must also deliver the goods without unreasonable delay, the reasonableness of the time occupied in the transit of the goods being dependent upon the particular circumstances of the case (*Taylor v. Great Northern Railway Co.* (1866)).

His duty is to deliver the goods to the consignee at the place which the consignee desires, or, if no destination is named by the consignee, at the place directed by the consignor (*London & North Western Railway Co. v. Bartlett* (1861)). The destination of the goods may also be changed by the consignor during the transit, by notice given to the carrier. Such a change is made, for example, when an unpaid seller of goods exercises his right of stoppage *in transitu*. A carrier who disobeys an order given by the consignor as to the destination of the goods will be responsible for their non-delivery at the place indicated (*Scothorn v. South Staffordshire Railway Co.* (1853), **Verschure's Creameries v. Hull & Netherlands S.S.C.** (1921)).

Delivery to
consignee

If the goods are refused when delivery is offered by the carrier, his liability, as far as a common carrier is concerned, is at an end. He then becomes an involuntary bailee of the goods, and, as such, is responsible only for the negligence of himself or his servants, unless there is some agreement to the contrary. It is a question of fact whether, after the refusal of the goods, he has acted with due care and caution (*Heugh v. London & North Western Railway Co.* (1870)).

Effect of
refusal to
accept
delivery

A common carrier is not compelled to take goods if he has not room for them in his carriage, and he is also entitled to decline them if they are not of the class or character which he professes to carry (*Garton v. Bristol & Exeter Railway Co.* (1861)).

No compul-
sion to take
goods unless
there is room

Dangerous
goods

Moreover, he can refuse to accept goods of a dangerous character, and such as would expose him to risks of an extraordinary kind. A carrier cannot always insist upon the nature of the contents of a package delivered to him being disclosed (*Crouch v. London & North Western Railway Co.* (1854)). If, however, dangerous goods are carried, and the carrier is ignorant of their nature, the consignor is liable to the carrier for any damage which ensues (*Brass v. Maitland* (1856); *Hutchinson v. Guion* (1858); *Farrant v. Barnes* (1862)). This is so even if the consignor had no knowledge or means of knowing that the goods carried were dangerous (*Bamfield v. Goole & Sheffield Transport Co.* (1910)). It should be observed that the Home Secretary has power to make by-laws regulating the conveyance of explosives by land by virtue of the Explosives Act, 1875 (38 & 39 Vict., c. 17).

Proof of
tender of hire
unnecessary
where carrier
refuses to
carry goods

If a carrier refuses to carry goods in the ordinary course, and an action is brought against him for such refusal, it is not necessary for the plaintiff to prove that he actually tendered the reasonable hire to the carrier when the goods were offered to him for carriage. The hire is not due until the carrier has accepted the goods (*Pickford v. Grand Junction Railway Co.* (1841)). Mere readiness and willingness to pay is quite sufficient.

As insurer

Liability at Common Law. The liability of a common carrier at common law is very great. The carrier is presumed to carry safely and securely, and he is responsible for any loss or injury which happens to the goods entrusted to him. His legal position is that of an insurer. And the liability lasts as long as the goods are in his custody, that is, from the time of their delivery to him (*Burrell v. North* (1847)), during their transit, and for a reasonable time afterwards, until the goods are delivered to the consignee. After the lapse of a reasonable time—the length of which depends upon the circumstances of the case—the carrier is liable only for negligence as a bailee, as has been already pointed out, unless it has been otherwise agreed between the parties. He is also bound to provide a fit and proper

As bailee

carriage for the goods (*Steel v. State Line Steamship Co.* (1877)).

This heavy liability, arising from any cause, e.g. robbery (*Morse v. Sluc* (1673)), or fire (*Forward v. Pittard* (1785)), is subject to three exceptions at common law. The first is the "act of God," by which is understood some unforeseen accident or natural cause which could not have been prevented by any reasonable foresight. See the elaborate examination of this term in the case of **Nugent v. Smith** (1876), in which Mellish, L.J., laid down the definition that "'act of God' is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." The second exception is an act of the king's enemies, that is foreign enemies, and the third is that which arises from any "inherent vice" in the goods carried. A common carrier is not liable for an injury caused by an inherent latent defect in the goods themselves, the existence of which was unknown both to the sender and to the carrier (*Lister v. Lancashire & Yorkshire Rly.* (1903)). The term "inherent vice" has a wide meaning, and includes natural deterioration and bad packing (*Richardson v. North Eastern Railway Co.* (1872)). Also if special care is required in the conveyance of goods, the carrier must be informed of the fact in order to fix him with liability (*Baldwin v. London, Chatham & Dover Railway Co.* (1882)). In *Hudson v. Baxendale* (1857) it was held that a carrier was not responsible for leakage arising from an imperfection in the bung of a cask entrusted to him to be carried, where the leakage was not caused by any negligence or omission on his part.

Exceptions
to liability

"Act of God"

king's
enemies

"Inherent
vice"

Except in so far as the common law has been modified by statute, the liability of the common carrier remains what it was. But it is always open to the parties to make special terms limiting that liability. For this

Notice of
special
conditions
excluding
liability

purpose express notice is necessary. But if it can be shown that a general notice of limitation of liability has been brought home to the consignor, it is sufficient. If, for example, when goods are delivered by the consignor to the carrier, a ticket with general conditions printed upon it is handed to the consignor, there is evidence that the special conditions are known and approved. But such evidence is not conclusive. In *Richardson & Co. v. Rowntree* (1894), the House of Lords held that where a ticket was issued to a steerage passenger containing conditions in small type with a stamping in red ink across them there was sufficient evidence on which the jury could find that the carriers had not done what was reasonably sufficient to give notice of the conditions.

It should be noticed that any agreement or condition exempting the carrier from liability for any loss or damage arising from wilful misconduct or gross negligence is absolutely void (*Wylde v. Pickford* (1841); *Martin v. Great Indian Railway Co.* (1867)).

Extent of Act

Carriers Act, 1830. This Act (11 Geo. 4, & 1 Will. 4, c. 68) was the first one passed which limited in any way the liability of common carriers. It applies only to carriers by land, or to cases where the carriage is partly by land and partly by sea, as long as the goods are on the land portion of their journey (*Le Conteur v. London & South Western Railway Co.* (1865); *Baxendale v. Great Eastern Railway Co.* (1869)).

Object of Act

The object of the Act, as set out in the preamble, was to prevent the frequent hardships which arose from the loss by the carrier of valuable goods packed in small compass, and to accomplish this end it was enacted, among other things—

(1) That the carrier should be informed when he was carrying anything especially valuable, so that he might give it a corresponding measure of protection;

(2) That he should be entitled to charge an extra sum for carriage to compensate him for his additional responsibility and trouble.

The value of the goods—which means the value to

the consignor, not the price charged to the consignee (*Blankensee v. London & North Western Railway Co.* (1881))—is fixed at £10, and the articles to which the Act applies, which are set out in sect. 1, include such things as coin, precious stones, jewellery, watches, negotiable securities, writings, title deeds, pictures, glass, china, and silk. If, therefore, a package containing such articles, of a value exceeding £10, is delivered to a carrier, information as to the nature of the goods and as to their value must be given at the time of delivery. The carrier is then entitled to make such increased charge as he has given general notice of in his office or other place of business. And he must demand the increased charge—the consignor is not bound to tender it—and even if no increased charge is made he will be liable for the value of the goods (*Behrens v. Great Northern Railway Co.* (1862)). He must also deliver a receipt of payment to the consignor, if such receipt is demanded, or his liability will be the same as at common law in spite of the Act (sect. 3). A neglect on the part of the consignor to declare the value and the nature of the goods will exempt the carrier from all liability for loss or damage, even where such loss or damage arises from gross negligence (*Morrill v. North Eastern Railway Co.* (1876)). But no exemption from liability can be claimed if the loss or damage has arisen from the felonious acts of the servants of the carrier, or from his own personal neglect or misconduct (sect. 8). A servant includes a person employed by an agent of the carrier to receive goods at a receiving house (*Stephens v. London & South Western Railway Co.* (1886)). Moreover the protection of the Act does not apply where the carrier wrongfully detains the goods (*Hearn v. London & South Western Railway Co.* (1855); *Millen v. Brasch* (1882)).

Limitation on
carrier's
liability

By sect. 56 of the Railways Act, 1921 (11 & 12 Geo. 5, c. 55), the provisions of the Act of 1830 limiting the carrier's liability in respect of certain valuables is applied to railways, with the modifications—

Application of
Act to
railways

(1) The value of the package for which a carrier by

rail is not liable is exceeding £25 and not £10, as in the case of other carriers.

(2) The provisions as to silks do not apply.

The Act further provides that no public notice shall limit the amount of the liability of a common carrier (sect. 4); but it is still open for the parties themselves to come to an express agreement.

Lien

Rights of the Carrier. In addition to the right of the carrier to receive the prescribed amount of the hire for the carriage of goods, which right has already been noticed, and which, as was stated above, is payable when the goods have been delivered to him, there also exists the valuable right of lien, that is, the power of retaining the goods which he is employed to carry, until his charges are paid, either by the consignor or by the consignee. (See Chapter XXI.)

Person having
property in
goods

Who is to Sue the Carrier? If goods are lost or damaged in the course of transit, it is a question of importance as to the person who should sue the carrier, the consignor or the consignee. Generally speaking, when a vendor delivers goods to a carrier to be conveyed to the vendee, the property in the goods vests in the latter. He, therefore, is the proper person to sue. And it makes no difference that the cost of carriage is paid by the consignor, and that the consignee has given no particular instructions as to the delivery of the goods (*Dutton v. Solomonson* (1803), *Brown v. Hodgson* (1809)). It seems that in all cases if the risk has been transferred to the consignee, he can sue the carriers (*Fragano v. Long* (1825)). But if there exists a special contract as to the carriage of the goods between the consignor and the carrier, the consignor may sue even though the property in the goods no longer rests with him (*Dawes v. Peck* (1799); *Dunlop v. Lambert* (1839)).

RAILWAY COMPANIES. It has already been stated that railway companies are not necessarily common carriers. A railway company is, however, a common carrier of the luggage which a passenger takes with him on a journey. If this is lost, stolen, or injured, without any

default on the part of the passenger, and the luggage is personal, the carrier is responsible for the loss, theft, or injury. The company is responsible whether the luggage is placed in the van or kept by the passenger in his compartment, as long as the passenger has exercised the care of an ordinary prudent man (*Hodkinson v. London & North Western Railway Co.* (1884); *Great Western Railway Co. v. Bunch* (1888); *Meux v. Great Eastern Railway Co.* (1895); *Talley v. Great Western Railway Co.* (1870)). Default has a very wide meaning, and includes interference with luggage after it has been placed in charge of a servant of a railway company, and leaving it in such charge for an unreasonable time either before the departure or after the arrival of a train.

Passenger's
luggage

In *Steers v. Midland Railway Co.* (1920), it was held that the company was liable for the loss of a passenger's luggage which was left in a sleeping-car while the passenger went for a meal. The company was also held liable where a passenger handed his suit-case to a porter with instructions to place it in a compartment and did not trouble further about it until the end of the journey (*Vosper v. Great Western Railway Co.* (1927)).

Railway and Canal Traffic Act, 1854. As railway companies were not necessarily common carriers, and to mitigate the harsh construction of the courts in turning what were practically public notices into special contracts, the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), was passed. By this statute, railway and canal companies are forbidden to limit their liability, as carriers of goods, by express agreements unless—

Restrictions
of limitation
of liability

(1) The special contract is signed by the consignor of the goods, or by his duly appointed agent, and

(2) The terms of the contract are held by the court to be "just and reasonable."

What will be held to be "just and reasonable" must depend upon the particular facts of each case. Two well-known cases, however, are worthy of notice in connection with special contracts made with railway

"Just and
reasonable"

companies. The first is *Peek v. North Staffordshire Railway Co.* (1863). The plaintiff sent some marble chimney-pieces from Stoke to London. Before despatching them he entered into communication with the defendant company as to their charges for carriage, and they declined to be responsible for damage unless the value of the chimney-pieces was declared, and an insurance of 10 per cent paid upon the declared value. The plaintiff considered this price too high and sent off the chimney-pieces in the ordinary course. In an action which was subsequently brought for injury sustained by the marble in the course of transit, it was held that there had been no special contract entered into freeing the defendant company from liability, and that the suggested special contract was neither just nor reasonable. The second case is *Brown v. Manchester, Sheffield & Lincolnshire Railway Co.* (1883). The plaintiff, a merchant, in consideration of getting his goods sent to London at a cheaper rate, signed a contract relieving the company "from all liability for loss or damage by delay in transit, or from whatever other cause arising." The House of Lords held that the contract was just and reasonable, and that the company were relieved from liability for losses sustained through delay in transit, even though the delay was caused by the negligence of the company's servants. See also *McMannus v. Lancashire & Yorkshire Railway Co.* (1859); and *Dickson v. Great Northern Railway Co.* (1886).

Amendments
by the
Railway Act,
1921

Practically all goods traffic is now carried under the Standard Terms and Conditions of Carriage, and these terms are considered, under sect. 43 (2) of the Railways Act, 1921, to be reasonable, and their reasonableness cannot be questioned by any court except the Railway Rates Tribunal. The above provisions as to a special contract and reasonableness in respect of the limitation of a railway company's liability therefore have now only a limited application. They apply particularly to passengers' luggage and merchandise for which a special contract is entered into under sect. 44 (3) of the Railways Act, 1921, i.e. "merchandise, livestock, or

damageable goods not properly protected by packing, or dangerous goods."

The seventh section of the Act as amended by the Railways Act, 1921, also provides that, unless a higher value has been previously declared, no greater amount can be recovered for loss or for damages sustained by animals conveyed than £100 for a horse, £50 per head for neat cattle, and £5 for any other animal.

"Animals"

Regulation of Railways Act, 1868. There are two sections only of this Act (31 & 32 Vict., c. 119) which need be noticed here. By the first of these, sect. 14, where a company, by through booking, contracts to carry animals, baggage, or goods, and the carriage is partly by rail and partly by sea, a condition exempting the company from liability for loss arising by sea "from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the sea," shall, if published in a conspicuous place in the booking office, and printed legibly on the freight note, be valid as part of the contract just as if the company had delivered a bill of lading containing the condition.

Limitation of liability in respect of acts of God, king's enemies, etc.

The second, sect. 16, provides for the equality of treatment of all passengers, as regards the fares charged, in a case where a railway company works steam vessels.

Railway working steam vessels

Railways Act, 1921. As already stated, by sect. 43 of the Railways Act, 1921 (11 & 12 Geo. 5, c. 55), the Standard Terms and Conditions of Carriage as a rule regulate the carriage of merchandise by rail. These terms and conditions are those on and subject to which will be carried—

Standard terms and conditions of carriage

(1) Merchandise other than live stock and live stock, will respectively be carried if carried at ordinary rates ;

(2) Merchandise other than live stock and live stock, will respectively be carried if carried at owner's risk rates ; and

(3) Damageable goods not properly protected by packing.

By sect. 44, a railway is under no obligation to carry damageable goods if they are not properly protected

Damageable goods

by packing, and the determination as to whether goods are properly packed is ultimately with the Railway Rates Tribunal (sect. 28).

Dangerous
goods

There is no obligation on the part of a railway company to carry dangerous goods (sect. 50), and questions as to whether goods are dangerous are determined by the Railway Rates Tribunal, but where a company has declared any article to be dangerous the onus of showing that it is not so is upon the person requiring it to be carried.

Live stock

The company's liability in respect of the carriage of live stock has already been dealt with at page 307, *ante*, and the amendments made by the 1921 Act are there included.

Liability of
shipowner at
common law

CARRIAGE BY SEA. The common law liability of the shipowner as a carrier was precisely the same as that of a land carrier. It was the custom, however, from an early time to limit that heavy liability by means of charter-parties and bills of lading. These were, and are, the special contracts made between the consignor and the shipowner, and will be noticed in more detail directly. But just as the common law liability of the land carrier was limited by special statutes, so the liability of the shipowner was diminished by legislation, the principal Act upon the subject, which is practically a codification of the law, being the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60). Part VIII of the Act, consisting of eight sections (502–509), is devoted to the liability of shipowners as carriers. The main provisions, however, as to carriage, may be summarised as follows—

Merchant
Shipping
Act, 1894

Exemption
from
liability for
loss or damage
by fire

(1) The shipowner is exempted from all liability for loss or damage by fire which has happened without his actual fault or privity.

Exemption
from
liability in
case of
robbery, etc.

(2) No claim can be sustained for loss or damage caused by robbery, embezzlement, or theft of such things as gold, silver, jewellery, or precious stones, unless the nature and the value of the same have been declared in writing to the shipowner or the master at the time of shipment.

(3) The amount of damages recoverable, where loss or damage has occurred without the actual default or privity of the owner, is limited, in respect of goods, to £8 per ton of the ship's tonnage, and in respect of loss of life, or personal injury, either alone or coupled with loss or damage to goods, to £15 per ton of the ship's tonnage.

Limitation
on amount
recoverable
for loss or
damage

For a full and accurate account of the exact extent and nature of the liability reference must be made to the Act itself, as well as to the Merchant Shipping (Liability of Shipowners and others) Act, 1900 (63 & 64 Vict., c. 32); the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48); the Merchant Shipping Act, 1911 (1 & 2 Geo. 5, c. 42); and the Merchant Shipping Act, 1921 (11 & 12 Geo. 5, c. 28).

It is very obvious how necessary it is for an insurance to be effected whenever the goods to be carried are of any particular value, even though the facts of the case may turn out to be such that the shipowner will be held liable. The limitation may possibly result, if the losses are very considerable, in the owner of the goods obtaining a small fraction of the value of the goods shipped. By sect. 506 it is enacted that "an insurance, effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under this Part of this Act shall not be invalid by reason of the nature of the risk."

Insurance

Affreightment. This is the special name given to the contract of carriage of goods by sea, for a price which is called the freight. It is found in two forms (a) Charter-parties, (b) Bills of Lading.

Charter-Party. A charter-party is an agreement in writing whereby a shipowner agrees to let an entire ship, or a part thereof, to any person (who is called the charterer) for the conveyance of goods on a specified voyage, or during a specified period, for a sum of money which the charterer undertakes to pay as freight for their carriage.

Definition

The charter-party may be under seal, that is, may

Stamp

be made by deed, but in any case it must be stamped. The duty is 6d., and the payment of it may be denoted by an adhesive stamp which must be cancelled by the person whose last execution gives binding effect to the document. A charter-party is rarely under seal, however, owing to the fact that the personal liability of an agent who makes a contract under seal, renders such a form unsuitable.

Nature of charter-party

The charter-party may, in certain cases, be a complete letting of the ship, and the merchant or other person who charters it may obtain complete power and control over it. But it is more general for the ship-owner to retain possession of the ship, and for the charterer to obtain nothing more than the right to have certain goods carried by it (*Sandeman v. Scurr* (1866)).

The name charter-party is probably derived from the two words *chartam partiri*, which signify to divide the parchment. It was an ancient custom, when a deed was drawn up, to write it in as many parts as there were parties upon the same piece of parchment, and afterwards to cut the document into these parts. Each of the parties retained his part for use in case of difficulties arising as to the terms of the contract.

Form of Charter-Party. No particular form is necessary in drawing up a charter-party and the forms of charter-parties vary considerably, as certain trades have their own special forms. But the stipulations usually inserted in all charter-parties will be found in the following specimen—

London, 1st June, 19..

Form

It is this day mutually agreed between A. B., owner of the good ship or vessel, called....., of the measurement of.....tons or thereabouts, now in the port of.....(or now at sea having sailed.....), and C. D. on behalf of E. F., merchants : that the said ship being tight, staunch, and strong, and every way fitted for the voyage shall with all convenient speed sail and proceed in the usual and customary manner with usual dispatch according to the custom of the port

(or in regular turn) (or shall sail from _____ on or before the _____), except in the case of accidents beyond the charterer's control to _____, or so near thereunto as she may safely get, and there shall load from the factor of the said _____ a full and complete cargo, say about _____ tons, not exceeding what she can reasonably stow away and carry, over and above her tackle, apparel, provisions, and furniture (the charterer's stevedore to be employed by the ship), and being so loaded shall therewith proceed to _____, or so near thereunto as she may safely get and deliver the same in the usual and customary manner on being paid freight as follows (or agreeably to the bills of lading), the Act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted. Freight to be paid on unloading and right delivery of the cargo. The said C. D. to be allowed _____ days for the loading and unloading of the said ship and _____ days on demurrage over and above the said lay days and time herein stated at £ _____ sterling per day. Penalty for non-performance of this agreement

The signatures of the parties are appended and attested by one or more witnesses.

"Lay days," or, as they are sometimes called, "running days," are the days allowed to the charterer for loading and unloading the ship. "Demurrage" is the agreed sum payable for delay beyond the time stipulated. "Peril of the seas" signify damage caused by the sea, storms, collisions, etc., of a nature which could not have been foreseen. The last-named term is well defined by Lord Herschell in *The Xantho* (1887): "I think it is clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words.

"Lay days"

"Demurrage"

"Perils of the seas"

They do not protect, for example, against that natural and inevitable action of the wind and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

Conditions

Conditions and Warranties. The stipulations contained in a charter-party, as has been already stated, vary with different trades. These stipulations may amount to conditions or warranties according to circumstances. If they are conditions, their non-fulfilment entitles the charterer to repudiate the contract. If they are warranties only, the contract cannot be repudiated, but the charterer is entitled to sue for damages. The clauses as to the place where the ship is, etc., are generally classed as conditions; the other clauses are held to be warranties.

Warranties at common law

The common warranties in connection with the conveyance of goods by sea are three, (a) seaworthiness of the ship, (b) dispatch, and (c) non-deviation.

1. Seaworthiness

By seaworthiness is meant the fitness of the ship to undertake the particular voyage contemplated. The warranty of seaworthiness is also implied in contracts of marine insurance, unless the policy is a time policy (*Gibson v. Small* (1853); *Dudgeon v. Pembroke* (1877)), and applies only to the time of loading and the time of sailing (*Dixon v. Sadler* (1839)). After the ship has started upon the voyage, there is no implied warranty that she will continue seaworthy during the voyage. The presumption is that a ship is seaworthy, but if she goes wrong very shortly after sailing, the shipowner or the assured will be called upon to show that the unseaworthiness arose from causes subsequent to the commencement of the voyage (*Ajum Goolam Hossen & Co. v. Union Marine Insurance Co.* (1901)). A ship is not seaworthy if the crew is incompetent (*Watson v. Clark* (1813)), or if she is unfit to carry the special cargo put on board (*Rathbone Bros. & Co. v. MacIver*

Sons & Co. (1903)), or if she is insufficiently provided with coal (*Greenock Steamship Co. v. Maritime Insurance Co. (1903)*). Compare the provisions of the Carriage of Goods by Sea Act, 1924, with regard to seaworthiness in respect of contracts to which that Act applies, page 316, *post*.

By dispatch is meant the undertaking of the ship-owner that the ship will commence and complete the voyage within a reasonable time. 2 Dispatch

Non-deviation is a warranty that the ship will not deviate from the usual course of navigation, and so be exposed to more than the usual risks. But necessity may justify deviation. 3 Non-deviation

The general principle is that deviation is justified when required for the safety of the adventure, i.e. the ship, the crew, and the cargo. Not only is it justified, it is the duty of the Master to deviate in such circumstances.

Deviation is equally justified where made to save human life or to aid a ship in distress where human life is in danger, and in all cases where it is caused by circumstances beyond the control of the Master.

Where the Carriage of Goods by Sea Act, 1924, applies, any deviation to save property or "any reasonable deviation" is justified (see page 319).

Bill of Lading. A bill of lading is a memorandum acknowledging the receipt of goods generally signed by the Master of a ship. It also contains the terms and conditions of the carriage of the goods which have been agreed upon by the parties. Definition

Even when a ship is chartered, and the charterer finds the whole of the cargo, a bill of lading is often used. Bills of lading, however, are most commonly met with when a cargo of different kinds of goods is collected from different consignors. A copy of the bill of lading is given to each consignor for the goods which he has shipped, and this is not only a receipt for the goods, but also a document which can be endorsed and delivered to another party, who thereby has the property in the goods named transferred to him, and who can alone demand delivery of them. Nature of bill of lading

Form of Bill of Lading. The forms of bills of lading, like those of charter-parties, vary considerably, and the only requirements as to their contents are those contained in the Carriage of Goods by Sea Act, 1924, which, however, has only a limited application. Bills of lading subject to the provisions of that Act are dealt with at page 311, *post*. Special provisions are frequently inserted to meet particular cases, but the main points to be found in any ordinary bill of lading are contained in the following specimen—

Shipped in apparent good order and condition by A. B., merchant, at the port of T, on board the good ship called K, the goods or packages of merchandise marked and numbered and described in this bill of lading (weight, measure, contents, and value unknown), to be delivered, subject to the terms and provisions hereinafter mentioned, in like good order and condition at the port of M (or as near thereto as she may safely get) unto C. D. or to his assigns.

Freight, charges, and primage as per margin to be paid by the

And it is mutually agreed as follows—

[Then follow, inter alia, provisions relating to Payment of Freight, Lien, Methods of Conveyance, Methods of Delivery, and General Average.]

Dated in T this day of 19. . .

E. F.

If the bill of lading is subject to the terms of the Carriage of Goods by Sea Act, 1924, it must contain an express statement that it is to have effect subject to the provisions of the Rules scheduled to that Act. If it is not so subject it will contain provisions excluding the liability of the carrier in the case of acts of God, strikes, etc., which provisions are implied in a bill of lading under the Act, see page 315, *post*.

The marks and the numbers identifying the goods are placed in the margin. See *Parsons v. New Zealand Shipping Co.* (1901).

"Primage" and "charges" are small customary payments to and necessary charges incurred by the master of the ship, such as lights, pilotage, wharfage, etc.

"Primage and charges"

The bill of lading is ordinarily signed by the Master, who affixes his signature as the agent of the owner of the ship. If, however, the ship has been chartered, he may be the agent of the charterer and not of the shipowner. Each case will depend upon its own special facts. Also, a charter-party is often incorporated with a bill of lading (*Repetto v. Millar's Karri & Jarrah Forests, Ltd.* (1901)).

Signature

A sixpenny stamp is required, and this must be affixed before the execution of the bill.

Stamp

The words "weight and contents unknown" are frequently added at the foot of a bill of lading, and also other words to the effect that the value of the goods is unknown. This is for the purpose of protecting the master of the ship. If no such words are contained in the bill, and it is stated that the goods are shipped in good order and condition, the bill of lading, *in the hands of a consignee or endorsee*, is evidence that the goods were, in fact, put on board in such a condition, even though the statement is untrue.

"Weight and contents unknown"

Carriage of Goods by Sea Act, 1924. The Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22) had for its object the alteration of the common law in favour of a shipowner provided that he carried out certain conditions imposed upon him. In *Angliss & Co. (Australia) Proprietary v. P. & O. Steam Navigation Co.* (1927), Wright, J., said: "The Carriage of Goods by Sea Act has introduced a new and obligatory code of responsibilities and immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while generally under the liability of common carriers, were free by contract to vary and limit their liabilities." The fact that there was no particular form required in drawing up a bill of lading had led British shipowners to curtail their liability in every direction possible with the result that consignees

Object of the Act

and endorsees, who had no share in the making of the original contract, suffered much hardship. Moreover, it was difficult to value a security when there was such a diversity of clauses and limitations in a bill of lading.

Scope of the Act

The Act consists of six sections and a Schedule. The Schedule, divided into Articles, contains the Rules relating to Bills of Lading, which are based upon the Hague Rules of 1921.

1 Restricted to "outward" bills

The Carriage of Goods by Sea Act, 1924, applies only to the carriage of goods by sea *from* ports in Great Britain or Northern Ireland to any ports, whether within Great Britain or not (sect. 1). That is, the Act applies only to outward bills of lading.

2 Not applicable to charter parties

The Rules under the Act are not applicable to charter-parties, but if bills of lading are issued under a charter-party they must comply with the Rules (Schedule, Article V). They apply only where the goods are covered by a bill of lading or similar document of title (Article I (c)).

3 Not applicable to live animals and deck cargo

Goods are defined in Article I (c) as including goods, wares, merchandises, and articles of every kind whatsoever, *except live animals* and *cargo* which by the contract of carriage is stated as being *carried on deck* and is so carried.

4 Only applicable to period between loading and discharge

The parties are governed by the Act in respect only of the period between loading and discharge (Article I (c)), and any contract may be entered into in respect of the period before loading and after discharge (Article VII).

5 Modification as to coasting trade and bulk cargoes

The Rules are modified to some extent in respect of the coasting trade (sect. 4) and bulk cargoes (sect. 5).

Responsibilities and liabilities of carrier—seaworthiness

Before and at the beginning of the voyage the carrier must exercise due diligence to—

(a) Make the ship seaworthy.

(b) Properly man, equip, and supply the ship.

(c) Make the holds, refrigerating, and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Neither the carrier nor the ship is liable for loss

resulting from unseaworthiness unless it is caused by want of due diligence to make the ship seaworthy, but where loss results from unseaworthiness the onus of proving the exercise of due diligence is upon the carrier.

On receipt of the goods the carrier must on demand of the shipper issue to him a bill of lading (which is *prima facie* evidence of the receipt by him of the goods) showing—

Issue of bill
of lading

(a) The leading marks necessary for identification of the goods;

(b) The number of packages or the quantity or weight as furnished by the shipper.

(c) The apparent order and condition of the goods.

The shipper is deemed to have guaranteed to the carrier the accuracy of the marks, number, quantity, and weight furnished by him.

Where a bill of lading has been issued acknowledging receipt of goods in good order and condition, the shipowner cannot allege that the goods were damaged before shipment, as against a holder or endorsee of the bill, nor can he allege insufficient packing (see exemption (14), page 318, *post* (*Silver v. Ocean S.S. Co.* (1930))).

The bill of lading must contain an express statement that it is to have effect subject to the provisions of the Rules contained in the Schedule to the Act.

Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery or if the loss or damage is not apparent, within three days, such removal is *prima facie* evidence of delivery of the goods as described in the bill of lading. In any event the carrier and the ship are discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or after the date when the goods ought to have been delivered.

Notice of
loss or
damage

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability

Carrier
cannot
further limit
his liability

for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided above, or lessening such liability, is null and void, and of no effect (Article III).

Shipper not
liable for
loss sustained
by carrier

The shipper is not responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Rights and
immunities
of carrier

There is now no absolute warranty of seaworthiness implied in a bill of lading to which the Rules apply (sect. 2). As has already been stated, it is the carrier's duty to exercise due diligence to make the ship seaworthy.

No implied
warranty as to
seaworthiness

Exemptions
in respect
of other
matters

Neither the carrier nor the ship is responsible for loss or damage resulting from—

(1) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship,

(2) Fire, unless caused by the actual fault or privity of the carrier;

(3) Perils, dangers, and accidents of the sea or other navigable waters;

(4) Act of God;

(5) Act of war;

(6) Act of public enemies;

(7) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(8) Quarantine restrictions,

(9) Act or omission of the shipper or owner of the goods, his agent or representative;

(10) Strikes, or lock-outs, or stoppages or restraint of labour from whatever cause, whether partial or general;

(11) Riots and civil commotions;

(12) Saving or attempting to save life or property at sea;

(13) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(14) Insufficiency of packing,

(15) Insufficiency or inadequacy of marks;

(16) Latent defects not discoverable by due diligence,

(17) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof is on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Default in the management of refrigerating machinery in a ship bringing foreign beef from Australia (*Foreman & Ellams, Ltd. v. Federal Steam Navigation Co.* (1928)), or negligence in the management of hatches (*Gosse Millard v. Canadian Government Merchant Marine, Ltd.* (1929)), have both been held not to amount to default in navigation or management of a ship within exemption numbered (1) above.

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, is not deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier is not liable for any loss or damage resulting therefrom.

Deviation to save life or property

The carrier is not liable for loss or damage to goods in an amount exceeding £100 per package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

Limitation on amount of liability

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods will be liable for all damages and expenses directly or indirectly arising out of such shipment. If such goods are shipped with the knowledge and consent of the carrier and they become a danger to the ship or cargo, they can be landed at any

Dangerous goods

place or destroyed without liability on the part of the carrier except to general average (Article IV).

Surrender of
rights by
carrier

A carrier may surrender in whole or in part all or any of his rights and immunities or he may increase his responsibilities and liabilities, provided that such surrender or increase is embodied in the bill of lading issued to the shipper (Article V). He cannot, however, increase his rights and immunities or lessen his responsibilities (Article III).

Transfer of Bill of Lading. The bill of lading may, or may not, name a special consignee. It is often made out in blank, and then the ownership of the goods remains in the consignor, whereas in the former case the consignee is the person who is entitled to them.

Indorsement
of bill of
lading

The person entitled to the goods named in a bill of lading may transfer the ownership in them to another person by the endorsement and delivery of the bill to the transferee. This can be effected at any time after the bill of lading comes into his hands, and if the transfer is made for value and the bill endorsed, the consignor's right of stoppage *in transitu* is gone.

The endorsement and delivery of a bill of lading always operated as a transfer of the property in the goods named in the bill. But, at common law, there was not, and could not be, for reasons already stated, a transfer of the rights under a contract made between the original parties. If, therefore, the transferee had to sue or to be sued in an action based upon the contract, it was necessary to join the consignor as a party. As this led to much inconvenience, the Bills of Lading Act, 1855 (18 & 19 Vict., c. 111) was passed, by which "every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." But see *Scwell v. Burdick* (1884), where it was held that the mere endorsement

and delivery of a bill of lading by way of pledge for a loan did not necessarily pass the property in the goods to the endorsee.

Bills of lading are not negotiable instruments. The transferee, even though he takes the bill *bona fide*, and gives value for it, acquires no better title than the transferor had (*Gurney v. Behrend* (1854)).

Not a negotiable instrument

Three Bills of Lading. It is usual to prepare three copies of a bill of lading. This is called "drawing in a set." One copy is retained by the consignor, a second by the master, and the third is sent to the consignee. If the first and third are delivered to different purchasers, the property in the goods passes to the purchaser who is first in point of time. But the master is not liable if he delivers the goods to any person who presents one of the parts of the bill of lading to him, even though he may not be the first transferee. He must, however, show that he acted in good faith, and that he had no notice of conflicting claims. If there is any dispute the master must interplead, that is, compel the opposing parties to fight out their claim between themselves, he expressing his readiness to give up the goods to the one who is declared to be the rightful owner. As to the inconvenience which sometimes arises from the fact of the existence of several bills of lading, see *Glyn v. East & West India Dock Co.* (1882).

"Drawing in a set"

Freight. Freight is the price paid to the shipowner for the carriage of goods to their destination. It is only payable on delivery, if the goods are not delivered, e.g. if the ship is lost, there is no freight. In *The Kathleen* (1874) it was held that where a ship is abandoned the contract to pay freight is dissolved, but such would not be the case where there was a mere temporary suspension of the voyage.

Definition

Must be delivery

Thus, in the absence of a special stipulation to the contrary, freight is not payable until the end of the voyage. It is therefore not unusual for a stipulation to be made that freight shall be payable in advance, usually upon the signing of the bills of lading. It is, however, essential that it should be clear that the

"Advance freight"

parties intend the payment to be "advance freight" and not merely a loan. A stipulation for payment at the port of loading is not sufficient to make payment amount to "advance freight" (*Mashiter v. Buller* (1807)). If "advance freight" is paid, it cannot be recovered, and if it is due and not paid, the shipowner can recover it even when the ship is lost (*Byrne v. Schiller* (1871)).

"Lump
freight"

Where a fixed sum is stipulated for as payment for the conveyance of goods it is generally known as "lump freight," and it is then not necessary that the whole cargo should be delivered by the shipowner to entitle him to freight as long as the rest of the cargo has been lost without his fault (*Manchester Shipping Co. v. Arncliffe* (1873)).

Pro rata
freight

Since it is a general rule that with the exception of advance freight, no freight is payable until the completion of the voyage, it is necessary that any stipulation for payment for part of the voyage, where it is not carried out in its entirety, should be made by contract (*Christy v. Row* (1808)). Such freight is denoted by the term "*pro rata* freight." A contract to pay *pro rata* freight may, however, be implied, e.g. where a ship is disabled and the cargo owners receive the cargo at some other place than that stipulated.

Amount of
freight

The amount of freight is generally provided for in the bill of lading or charter-party; if provision is not there made and it is clear from the contract that freight is to be paid, it must be calculated at the ordinary rates ruling at the time when the shipment was made.

Lien for
freight

A shipowner has, as a rule, a right to retain goods until the freight upon them has been paid. This lien is upon goods only for freight proper, and not for "advance freight" (*Kirchner v. Venus* (1859)). The lien exists in respect of freight only on the particular goods detained, although it is available even against the true owner of the goods who may not himself be liable for payment of the freight. Strictly, by common law, once the shipowner parted with possession of the goods his lien was lost; as this caused considerable

inconvenience the Merchant Shipping Act, 1894, sects. 492-501 made it possible for him, in certain cases, to retain his lien after parting with possession. The ship-owner may waive his right of lien either expressly or by implication.

CARRIAGE BY AIR. The law of carriage by air is still in course of being built up. The common law was quite inadequate to cope with the growth of transport by air, and there are consequently one or two statutes and numerous regulations dealing with the subject.

The general principles of the law of air transport are to be found in the Air Navigation Act, 1920, which provides (*inter alia*) for the establishment of aerodromes and the making of regulations as to investigation of accidents. It also provides that no action shall lie in respect of trespass or nuisance by reason of the flight of aircraft over property, at a reasonable height above the ground, provided the provisions of the Act and Regulations made under it are complied with. The law relating to wreck and salvage, and the duty of rendering assistance to vessels in distress, apply to aircraft as to vessels.

General
principles

Based on the Warsaw Convention of 1929, the Carriage by Air Act, 1932, has been passed and may be applied to international and inland carriage by Order in Council. This Act regulates such matters as tickets for both luggage and passengers, consignment notes, and the liability for the safety of passengers and goods.

Carriers by air may be common carriers, just as any other carriers may be, but by special contract there may be a repudiation of the common carrier's liability (*Aslan v. Imperial Airways, Ltd.* (1933)).

CHAPTER XV

INSURANCE

Definition

INSURANCE is a contract whereby one person, called the "insurer" or "assurer," undertakes to indemnify another person, called the "insured" or "assured," against a loss which may arise, or to pay a sum of money to him on the happening of a specified event. The consideration is either a single or a periodical payment, and is called the "premium." In the case of marine insurance the name of "underwriter" is more commonly used than "insurer" or "assurer." The document in which the contract of insurance is contained is termed the "policy of insurance."

The forms of this contract have become very varied, and it is now possible to insure against almost any conceivable risk. Four kinds of insurance, however, stand out as being of special importance, Accident, Life, Fire, and Marine, and they are the only ones dealt with in this chapter.

Wagering contract

In many respects there is a great resemblance between a contract of insurance and a wagering contract (*Carter v. Boehm* (1763); *Godsall v. Boldero* (1807)). The main distinction between them, however, consists in the fact that the insured has an interest of a pecuniary nature in the risk against which he insures, a thing which is absent from a wagering contract. Also the calculation of the risk incurred is based upon the doctrine of probabilities in a manner totally distinct from that employed in the case of a wager.

Indemnity. Indemnity is the basis of all contracts of insurance, except contracts of life or accident insurance. In *Castellain v. Preston* (1883), Brett, L.J., said: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured,

in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified."

A contract of life insurance is not a contract to indemnify against loss like a fire or a marine policy, but is a contract to pay a definite sum in consideration of an annuity paid during life, the amount of the annuity being calculated in the first instance according to the probable duration of the life of the party paying it (*Dalby v. India and London Life Assurance Co.* (1854)).

Life
Insurance

Similarly, because a person cannot be indemnified for the loss of life an accident insurance policy is not a contract of indemnity (*Theobald v. Railway Passengers Assurance Co.* (1854)).

Accident
insurance

Disclosure of Material Facts. In the general view of the law of contract it has been pointed out that misrepresentation will render a contract voidable at the instance of the party deceived. In contracts of insurance, however, something more is required than an absence of misrepresentation. Every material fact must be disclosed which would be likely to affect the judgment of the insurer. It is not enough that there should be an absence of misrepresentation. If any information, which is within the knowledge of the assured, is withheld, the policy of insurance will be voidable (*Ionides v. Pender* (1874); *London Assurance Co. v. Mansel* (1879); *Barnden v. London, Edinburgh, & Glasgow Assurance Co.* (1892)). It is always a question for a jury to decide whether any particular fact is or is not material, whatever the belief of the parties may have been (*Lindenau v. Desborough* (1828); *Westbury v. Aberdeen* (1837)). The reason for the necessity of full disclosure is that "one of the parties is presumed to have means of knowledge which are not accessible to the other, and is then bound to tell him everything which may be supposed to affect his judgment." Contracts which require a disclosure of all material facts and the utmost good faith are said to be *uberrimae fidei*.

Misrepresentation

*Uberrimae
fidei*

Any material fact that comes to the proposer's

Knowledge
acquired by
proposer
between
making
proposal and
acceptance

knowledge before the contract is made must be disclosed. Thus a change in a circumstance affecting the matter between filling in a proposal and its final acceptance by the company must be disclosed (*Looker v. Law Union & Rock Insurance Co.* (1928)).

The case of *Biggar v. Rock Life Assurance Co.* (1902), is an illustration of the care which must be exercised in the filling up of a proposal form for an insurance, and of how a misrepresentation of an agent is the misrepresentation of the principal. A policy was effected against accidental injury with an insurance company through their local agent. The proposal form was filled up by the agent, and many of the answers were false in material respects. These answers were inserted without the knowledge or the authority of the applicant, who signed the form but never read it. The proposal further contained a declaration in which the applicant agreed that the statements in the proposal were to be the basis of the contract, and that the insurance was effected upon the express condition that these statements were true. In an action to recover the amount of the insurance it was held, first, that the insured was bound to read the terms contained in the proposal before signing it, and that he was estopped from denying that he was ignorant of them, and, secondly, that in the filling up of the proposal form the local agent was acting as the agent of the insured and not of the insurance company. On these grounds it was decided that the policy was void.

In *Paxman v. Union Assurance Society, Ltd.* (1923), it was stated, however, that when an insurer relied on *Biggar v. Rock Life Assurance Co.* (*supra*), the attention of the court should also be called to *Bawden v. London, Edinburgh & Glasgow Assurance Co.* (1882). In that case a policy was taken out in respect of the complete and irrecoverable loss of sight to both eyes. Unknown to the insurance company the insured had already lost the sight of one eye; this fact, however, was known to the agent of the company at the time the contract was entered into. The court held that the fact that the agent knew that the insured had lost the

sight of one eye amounted to knowledge on the part of the insurers and that they were liable.

Where it is provided that a proposal shall be the basis of the contract, the truth of the statements made in the proposal is a condition of the liability of the insurers quite apart from whether the inaccurate statement was material or not, and a policy will be void by reason only of an inadvertent and immaterial mis-statement (*Dawsons, Ltd. v. Bonnin* (1922)).

Proposal
as basis of
contract

In *Holmes v. Scottish Legal Life Assurance Society* (1932), where a policy provided that it should be avoided by any "fraudulent or untrue" statement in the proposal, the court held that an untrue statement included an innocent misstatement.

ACCIDENT INSURANCE. This class of insurance, although to some extent a contract of indemnity, is more especially an undertaking to pay a certain specified sum in the event of death or of injury from accident. The insurer, in the case of an accident happening, and of his paying the sum named in the policy is not subrogated (*infra*) to the rights of the insured. Therefore a person insured (or his legal personal representative in case of death) is not precluded from claiming damages in respect of the injury he has sustained (or in respect of his death) because an insurance has been effected against such a contingency.

Insured's
right to
damages

The conditions of a policy of insurance should be most carefully examined before it is signed by the insured. This caution, though applicable to all kinds of insurance, is especially necessary in the case of accident insurance. The construction of the document is, of course, for the court, and no special rules can be laid down for the guidance of the parties. But the danger of allowing ambiguous language to appear in such policies is well shown by such cases as *Winspear v. Accident Insurance Co.* (1880); *Lawrence v. Accidental Insurance Co.* (1881); *Wardorf v. Accident Insurance Co.* (1903); *In re Scarr & General Accident Assurance Corporation, Ltd.* (1905); and *Rogerson v. Scottish Automobile & General Insurance Co.* (1931).

Stamp duty

The stamp duty upon the policy is six pence. By sect. 116 of the Stamp Act, 1891 (54 & 55 Vict., c. 39), as amended by the Finance Act, 1920, provision is made for the compounding of insurance duties to meet such cases as those of newspapers and periodicals, which insure their subscribers against accidental death or injury.

Third parties

By the Third Parties (Rights Against Insurers) Act, 1930 (20 & 21 Geo. 5, c. 25), certain rights are conferred on third parties against insurers of third party risks in cases where the person insured becomes insolvent. This Act was passed to alter the law as laid down in *In re Harrington Motor Co.* (1928). In that case a company went into liquidation after judgment had been obtained against it for personal injuries, and the insurance company paid the amount of damages to the liquidator. The court held that the person injured was not entitled to the amount paid but must prove, like any other creditor, the sum forming part of the assets of the company for distribution.

Motor Insurance

The Road Traffic Act, 1930, provided that it shall not be lawful for a motor vehicle to be used on the road unless a policy of insurance in respect of third party risks is in force. Compulsory third party insurance is a new principle in English law, and has given to motor insurance an even greater importance than it had formerly.

Definition

LIFE ASSURANCE. Life insurance (as assurance, as is the usual and more correct term) is that form of insurance by which the insurer undertakes, in consideration of certain premiums, whether a single one or spread over a period of time, to pay to the person for whose benefit the insurance is made a certain sum of money upon the death of the person whose life is insured, or after a certain period, whichever first occurs.

Sir George Jessel defined it as "a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, of the payment of an annuity during the life of the party insuring."

The forms of life assurance are very numerous, and novel methods are being continually introduced. One of the most favoured is the system of endowment policies, by which it is stipulated that the payment of the policy money shall be made either on the death of the person insured, or after the lapse of a specified number of years, whichever shall first happen. The premium is naturally much higher in the case of endowment policies than in that of ordinary policies, and varies inversely as the number of years after which the assurance money becomes payable.

Forms of
policy—
endowment
policies

Insurable Interest. No person can legally effect any insurance in this country unless he has some interest, i.e. pecuniary interest (*Barnes v. London, Edinburgh, & Glasgow Assurance Co.* (1892); *Harse v. Pearl Life Assurance Co.* (1904)), in the thing insured. As Lawrence, J., said in *Lucena v. Craufurd* (1806), insurable interest in a thing signifies being "so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

Necessity for
pecuniary
interest

The Life Assurance Act, 1774 (14 Geo. 3., c. 48) was passed to prevent a "mischievous kind of gaming," it enacted—

"(1) No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

"(2) It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwritten.

"In all cases where the insured hath interest in such

life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

Assurance on
own life

This does not prevent a person effecting an assurance upon his or her own life. And since life assurance is not a contract of indemnity, but an agreement to pay a fixed sum upon the happening of a certain event, there is no limit to the amount for which an assurance upon one's own life can be made (*Dalby v. India & London Life Assurance Co.* (1854)). Also, for the same reason, when an assurance is effected by one person upon the life of another, it is only necessary that the interest shall exist at the time when the policy is issued. For example, a creditor may insure his debtor's life for the amount of his debt, and recover that amount from the assurance office at the debtor's death, even though the debt has been diminished or extinguished (*Hebdon v. West* (1863)).

Interest must
exist at time
policy issued

Creditor

Who has Interest? Interest, it must be remembered, means pecuniary interest. Such an interest has every person in his or her own life, and a creditor in the life of his debtor, to the amount of his debt, as has just been stated. A beneficiary may insure the life of his trustee (*Collett v. Morrison* (1851)), and so may a trustee insure in respect of the interest of which he is a trustee (*Tidswell v. Ankerstein* (1791)). A wife has an interest in the continuance of her husband's life, and this is specially recognised by the Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), sect. II. It has been held that a husband has an insurable interest in the life of his wife (*Griffiths v. Fleming* (1909)). There is no presumption that a father has an insurable interest in the life of his child (*Halford v. Kymer* (1830)). The circumstances of a case may, of course, show that he has such an interest. By the Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8), however, assurance to a limited extent may be effected by certain persons who are under a moral obligation to provide for the burial of a relative, but would not otherwise be considered to

Beneficiary
and trustee

Wife

Husband

Father

For expenses
of burial

have an insurable interest in the life of the assured; such persons include parents and grandparents.

The rights of an alien under a contract of assurance are suspended on his becoming an enemy alien, but a policy of life assurance does not become void merely by the assured becoming an alien enemy. The payment to and receipt by the company of the premiums does not involve illegal intercourse with the enemy (*Seligman v. Eagle Insurance Co.* (1917)).

Alien enemy

Under the above-mentioned section of the Married Women's Property Act it is further enacted that if a husband insures his life, or a woman insures her life, and it is expressed on the face of the policy that the assurance is for the benefit of the wife or husband, and of their family, a trust is created and the assurance money forms no part of the assured's estate. But circumstances may alter this, e.g. the murder of the assured by a person who was to be benefited in the event of his death (*Cleaver v. Mutual Reserve Fund Life Association* (1892)). See also *In the goods of Crippen* (1911). Fraud would also vitiate such a trust, as for example, if the whole scheme of the assurance was to defeat creditors. In either case the assurance money would form a part of the estate of the assured.

Creation of trust

Fraud

How Life Assurance is Effected. Before a policy of life assurance is granted to the assured, a proposal form has to be filled up. This consists of a number of inquiries as to the life, habits, and antecedents of the proposer. The answers must be made with the greatest care, because the proposal form is regarded as a part of the policy. This matter has already been referred to in a general way, and additional information may be gathered from the cases of *Ellinger & Co. v. Mutual Life Insurance Co. of New York* (1905); *Hemmings v. Sceptre Life Association, Ltd.* (1905); and *Yorke v. Yorkshire Insurance Co.* (1918). The risks insured against are set out in the policy itself, also the time during which the contract is to remain in force, the names of the parties and the amount of the assurance, and the method of payment of the premium. It is a

Proposal

Days of grace

common custom for assurance offices to allow a certain number of days of grace for the payment of any instalment of the premium. This does not follow as a matter of course, and a clause to this effect should be inserted in the policy if the insured wishes to rely upon it. As in every other contract evidenced by writing the utmost care should be taken to see that all the desired terms are inserted in the policy, since evidence to vary the policy is not admissible. If the days of grace allowed by the policy for the payment of the premium are allowed to expire, the assurance terminates, but it is usual for companies to permit lapsed policies to be revived on payment of the premiums in arrear, with interest.

Stamp duties

Stamping. Policies of life insurance must be stamped as follows—

Where the sum insured does not exceed £10	1d.
Exceeds £10, but does not exceed £25	3d.
Exceeds £25, but does not exceed £500, for every £50 or fractional part thereof	6d.
Exceeds £500, but does not exceed £1,000, for every £100 or fractional part thereof	1s
Exceeds £1,000, for every £1,000 or fractional part thereof	10s.

Assignment of Policies. By the common law, a policy of insurance, being a *chose in action*, could not be assigned or transferred to a person who was not a party to the contract. But by the Policies of Assurance Act, 1867 (30 & 31 Vict., c. 144), a life policy can now be assigned, either by indorsement of the policy or by a separate instrument, and the assignee can sue in his own name without showing that he possesses any personal interest. A written notice of the assignment must be given to the insurance office, and the insurer must, upon receiving notice, give a certificate acknowledging the receipt. The policy specifies the place of business to which the notice must be sent. Reference should here be made to the right, in certain circumstances to assign a chose in action under the Law of Property Act, 1925 (see page 89, *ante*, where the matter is dealt with).

Effect of assignment

This power of assignment enables a person to effect an insurance upon his own life and then transfer the

policy to another person for the latter's benefit, when the same thing could not be directly carried out owing to the absence of insurable interest. Of course, the assignee takes the policy subject to all the equities, that is, he can be met by any of the defences which would be available against the assignor.

FIRE INSURANCE. The contract of fire insurance, unlike that of life insurance, is one of indemnity, the insurer undertaking, in consideration of the premium paid, to make good any loss or damage caused by fire during a specified period (*Darrell v. Tibbitts* (1880)). The maximum amount which can be claimed is fixed by the parties to the contract, but this amount is not the measure of the loss. The loss can be ascertained only after a fire has occurred.

Definition

The period for which the insurance is effected is generally one year, and the policy is renewed annually by payment of another premium, the insurer generally allowing fifteen days, called days of grace, after the expiration of the year for the renewal of the policy.

Days of grace

As in life insurance, the insured person must have an insurable interest in the subject-matter of the contract. As a rule, any existing right or interest amounts to an insurable interest. An owner can insure his own goods, a trustee the property which he holds in trust, a common carrier the things which come into his possession in the ordinary course of his trade, and a pawnbroker his pledges. In *Macaura v. Northern Assurance Co.* (1925), it was held, however, that neither a shareholder nor a simple creditor of a company has any insurable interest in any particular asset of the company. One insurance office has a sufficient insurable interest in any property which has been insured with it to re-insure in another office. Such re-insurance is exceedingly common when the property is valuable, and then any loss which occurs is widely distributed, and makes no great drain upon the resources of any one office or company.

Insurable interest

Re-insurance

Proposal and Policy. These are very similar in effect to those used in the cases of accident and life insurance.

Disclosure

The utmost good faith is required in filling the proposal form, and the policy names the risks which are insured against. The policies will vary greatly according to the nature of the property or goods insured, and the exact construction of each will depend upon the particular facts. As a general rule, in addition to the requirements of full disclosure and true description, in order to maintain the validity of the policy the insured is bound:

Other
liabilities
of insured

(1) Not to increase the risk subsequently to the granting of the policy by doing anything to the goods insured or to the building in which they are contained without the consent of the insurer;

(2) Not to remove the goods without the consent of the insurer;

(3) Not to assign the goods otherwise than by will.

Premiums

No policy is issued until after the first premium has been paid. Subsequent premiums must as a rule be paid punctually upon the dates upon which they are due in order to keep the policy alive.

Stamp duty

The policy must bear a sixpenny stamp, which may be an adhesive one.

Notice of loss

When a loss occurs, it is generally stipulated that notice shall be given to the insurance office within a certain time, accompanied by full particulars of the goods destroyed and an estimate of their value. This will then be a condition precedent to the insured's taking proceedings to recover the amount of the loss which he has sustained. A condition precedent of this or a similar kind is not confined to fire insurance only. See *Worsley v. Wood* (1796); *London Guarantee Co. v. Fearnley* (1880). If the parties cannot agree the dispute is commonly referred to arbitration.

Limit on
amount
recoverable

As a person cannot recover more than the amount of his actual loss, limited as has been stated to the sum fixed by the policy, there is no advantage in effecting numerous insurances in various offices in excess of the total value of the property. If this is done, the insurance offices share the losses, each paying in proportion to the amount insured with them.

Rights and Liabilities of Insurer. Moreover, an insurer is entitled to every right of the insured which arises upon the occurrence of the risk, and is independent of the insurance. This is known as the doctrine of "subrogation." Subrogation is defined in the *Dictionary of Fire Insurance* as "a legal process arising out of the right of one party on payment of compensation to another to avail himself of any rights and remedies possessed by the other, against a third party in connection with the event which gave rise to the compensation." Thus where the insurers have paid the loss they become subrogated to any source of compensation open to the insured. If the insured is not fully indemnified by the insurers he may retain any amount recovered by other means to make up his indemnity, and any surplus he must refund to the insurers.

Subrogation

The following will serve as examples of the application of the doctrine.

Where a person insured his goods, which were stored in a warehouse, against fire and the goods were destroyed by fire, if the insurers paid the losses they were entitled to the rights of the insured against the warehouse-keeper (*North British & Mercantile Insurance v. London, Liverpool & Globe Insurance Co.* (1877)).

In *Midland Insurance Co. v. Smith* (1881), where a house, insured against fire was deliberately burnt by the wife of the insured it was held that the insurers were liable, and as the insured could not sue his wife, so the insurers, who could claim only under the doctrine of subrogation, the rights of the insured, were without remedy.

"In order to deter and hinder ill-minded persons from wilfully setting their houses or other buildings on fire, with a view of gaining to themselves the insurance money," the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), was passed by which it was enacted that when a building in the Metropolitan district is burned down, any person interested—especially the insurance offices—may require the insurance money to be laid out in repairing or in rebuilding the structure.

Rebuilding premises destroyed by fire

Damage by
fire brigade

By sect. 12 of the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict., c. 90), any damage occasioned by the Metropolitan Fire Brigade "in the due execution of their duties, shall be deemed to be damage by fire within the meaning of any policy of insurance against fire."

Consent of
insurer

Assignment. A policy of fire insurance is not assignable except with the consent of the insurer. Upon the sale of any property, therefore, it is the duty of the purchaser to effect a fresh insurance in order to secure himself against loss (*Rayner v. Preston* (1881)). By sect. 47 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), however, where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same be received by the vendor.

Definition

MARINE INSURANCE. This is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against losses arising from certain perils or sea risks, to which his ship, merchandise, or other interest, such as freight, may be exposed during a certain voyage, or for a certain period of time. It is defined in sect. 1 of the Marine Insurance Act, 1906, as "a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure." Like fire insurance, it is a contract of indemnity, that is, the insured cannot claim more than his actual loss. The insurance is generally effected with a number of individuals called "underwriters." This term arises from the fact that the persons who signify their willingness to take part in the risk as insurers subscribe their names to the policy, and state the sum for which they respectively

agree to be liable. The best known association of underwriters is Lloyd's, who carry on business in Leadenhall Street, London.

The policy of marine insurance is generally negotiated by an insurance broker employed by the insured. As the broker is personally liable to the underwriters for the premium to be paid (*Universo Ins. Co. of Milan v. Merchants' Marine Insurance Co.* (1897)), his position is rather that of a middleman than of an agent. The practice is for the broker to prepare a brief memorandum of the terms of the intended policy, and the underwriters initial it for the amount each of them proposes to underwrite. This document is called the "slip." If the insurance is undertaken by companies, a separate slip is prepared for each company. It is from the slip that the policy is drawn up.

Negotiation
of policy by
brokers

The "slip"

An Act codifying the law relating to marine insurance was passed in 1906 (Marine Insurance Act, 1906 (6 Edw. 7, c. 41)), and throughout this chapter, unless otherwise indicated, references are to that Act.

Insurable Interest. As in other kinds of insurance, the insurer must formerly have had an insurable interest in the subject-matter of the insurance at the time of his effecting the insurance. This is now provided for by sect. 5 of the Marine Insurance Act, 1906, which enacts that "every person has an insurable interest who is interested in a marine adventure. . . . A person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof." By sect. 6 it is provided that "the assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected."

An insurance is sometimes effected when a ship is supposed to be on a voyage, and the parties are

"Lost or not
lost"

unaware whether it is still in existence. The words "lost or not lost" are inserted to cover such a case, and if it afterwards turns out that a loss had actually occurred before the time that the policy was effected, the insurance is valid. But if the insured was aware at the time of effecting the policy that a loss had taken place, he cannot recover. Conversely, if the underwriter knew that the voyage had been safely concluded, he is bound to return the premium.

Who has an
insurable
interest?

The persons who have an insurable interest such as is required by law include the shipowner, the owner of the goods carried, the mortgagee of the ship, the insurer of the ship or of the cargo, the person entitled to receive freight, and the master and the seamen for their wages, and, further, it was held in *Moran v. Uzielli* (1905), that a person who advances money for a ship's necessities, otherwise than under a bottomry bond, may insure to the extent of his advances. In each case the amount of insurance is limited to the extent of the various interests of the parties. A partial interest of any nature is insurable and the assured has an insurable interest in the charges of any insurance which he may effect. Alien enemies cannot insure, as this is contrary to public policy (*Janson v. Driefontein Consolidated Mines, Ltd.* (1902)).

Re-insurance

An underwriter frequently covers his own risk by re-insurance. Sect. 9 of the Act provides that the insurer has an insurable interest in his risk, and may re-insure in respect of it. Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance. A re-insurance needs a formal policy in order to be valid (**Motor Union Insurance Co. v. Mannheimer Versicherungs-Gesellschaft** (1932)), and such a policy must be stamped like any other contract for sea insurance, even though the policy takes the form of a participation agreement between two insurance companies (*English Insurance Co. v. National Benefit Insurance Co.* (1929)).

Assignment
of interest

The interest of the assured may be assigned, but in such a case the assured does not transfer to the assignee

his rights under the contract of insurance unless there is an express or implied agreement with the assignee to that effect (sect. 15).

Insurable Value. Insurable value must not be confused with insurable interest referred to above. Insurable value is the amount of the valuation of an insurable interest for the purposes of insurance. It is ascertained, where there is no express provision or valuation in the policy, according to the rules laid down in sect. 16 of the 1906 Act.

Double Insurance. Double insurance exists where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and where the sums insured exceed the indemnity allowed the assured is said to be over-insured by double insurance.

In a case of over-insurance by double insurance, the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed. Where he receives any sum in excess of the indemnity allowed he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves (sect. 32).

Gambling Policies. By sect. 4 of the Marine Insurance Act, 1906, it is provided that every contract of marine insurance by way of gaming or wagering is void. A contract of marine insurance is deemed to be a gaming or wagering contract where the insured has not an insurable interest, and the contract is entered into with no expectation of acquiring such an interest or where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term. Where, however, there is no possibility of salvage, the policy may be effected without benefit of salvage to the insurer.

This provision of the 1906 Act was found to be inadequate to prevent gambling policies from being

entered into and, in consequence, the Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12), was passed, by which if any person effects a contract of marine insurance without a *bona fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such an interest, the contract is a contract by way of gambling on loss by maritime perils and the person effecting it is liable to six months imprisonment with or without hard labour, or to a fine not exceeding £100. There is a similar penalty if any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest" or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term.

*Uberrima
fides*

Disclosure and Representations. A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith is not observed by either party, the contract may be avoided by the other party (sect. 17).

Disclosure

The assured must disclose before the conclusion of the contract every material circumstance known to him, and he is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If he fails to make such disclosure the insurer may avoid the contract. A material circumstance is one which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk, and is a question of fact in each case (sect. 18). In *Ionides v. Pender* (1874) it was held that over-valuation was a material fact, although it would not affect the risks of a voyage, because it would weigh with an underwriter in deciding whether or not to take the risk and what premium he should charge.

If there is evidence of concealment of a material

fact the onus is upon the claimant to prove that he disclosed the fact. (*Glücksman v. Lancashire & General Assurance Co.* (1927)).

A similar duty to disclose is placed upon an agent effecting insurance (sect. 19).

Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If untrue, the insurer may avoid the contract. Such representation may be either as to a matter of fact, in which case it must be substantially true, or as to a matter of expectation or belief, in which case it is true if made in good faith (sect. 20).

Policy of Marine Insurance. The policy is a very complex document. A contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Act (sect. 22). Attempts to overcome the stringency of this provision have proved futile (see *Genfarsikungs Aktieselskabet (Skandinavia Re-insurance Co. of Copenhagen) v. Da Costa* (1911), and **Motor Union Insurance Co. v. Mannheimer Versicherungs-Gesellschaft** (1932)).

A marine policy, which must be signed by or on behalf of the insurer (sect. 24) must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf ,

(2) The subject-matter insured and the risk insured against ;

(3) The voyage or period of time or both, as the case may be, covered by the insurance ;

(4) The sum or sums insured ;

(5) The name or names of the insurers.

Every clause contained in an ordinary policy of marine insurance has been examined at some time or other in a court of law, and the meaning of each is very well known to persons who are connected with the shipping world. The policy may be in print or in writing, or it may be partly written and partly printed.

The following is a copy of Lloyd's form of policy as set out in the Schedule to the Act.

Representations

they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, etc., or any part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defences, Safeguards, and Recovery of the said Goods and Merchandises and ship, etc., or any part thereof, without Prejudice to this Insurance; to the charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

In witness whereof, we, the Assurers, have subscribed our Names and Sums assured in

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds

per Cent. ; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent, unless general, or the Ship be stranded.

Construction
of policy

It is quite impossible to attempt anything in the shape of an exhaustive and critical examination of the various terms and phrases used in a policy of marine insurance. For full particulars reference must be made to works which deal specially with Marine Insurance. There are, however, certain rules for the construction of policies of marine insurance set out in the Act, and these, together with certain other matters, may usefully be dealt with here.

S. G.

S. G.—The letters S. G. are supposed to represent the Italian *somma grande*, the total sum insured.

Memorandum
clause

Memorandum. The clause at the end of the policy, commencing with the letters N.B. is generally known as the memorandum. Its object is to protect the underwriters against trifling losses, or against any losses in the case of certain perishable goods. The excepted goods, it will be noted, are "warranted free from average, unless general," that is, free from loss unless the loss is incurred for the general benefit of the ship and cargo. To cover these small losses there are certain associations which undertake the insurance of these otherwise uninsured interests.

Sue and
labour clause

Sue and Labour Clause. The clause commencing "*And in case of any loss or misfortune*" is generally known as the "Sue and Labour Clause." Its object is to give to the insured some inducement to endeavour to save property by guaranteeing any expenses to which he is put in minimising the insurer's losses.

Statutory
rules

The following are the statutory rules of construction where the context does not otherwise require—

Lost or not
lost

(1) *Lost or Not Lost.* Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless at such times the assured was aware of the loss, and the insurer was not.

From

(2) *From.* Where the subject-matter is insured

"from" a particular place, the risk does not attach until the ship starts on the voyage insured.

(3) *At and From*—(a) [Ship.] Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. At and from

If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(b) [Freight.] Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

(4) *From the Loading Thereof*. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship. From the
loading
thereof

(5) *Safely Landed*. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases. Safely landed

(6) *Touch and Stay*. In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination. Touch and
stay

- Perils of the sea** (7) *Perils of the Seas*. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.
- Pirates** (8) *Pirates*. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.
- Thieves** (9) *Thieves*. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.
- Restraint of princes** (10) *Restraint of Princes*. The term "arrests, etc., of kings, princes, and people," refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.
- Barratry** (11) *Barratry*. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer.
- All other perils** (12) *All Other Perils*. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.
- Average unless general** (13) *Average Unless General*. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."
- Stranded** (14) *Stranded*. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.
- Ship** (15) *Ship*. The term "ship" includes the hull, materials, and outfit, stores, and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.
- Freight** (16) *Freight*. The term "freight" includes the profit derivable by a shipowner from the employment of his

ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

(17) *Goods*. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. Goods

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

Other Clauses in Policy. The following clauses which are frequently found in policies of marine insurance in addition to these contained in the form at page 342, should be noticed—

(1) *Continuation Clause*. This clause is inserted in policies issued for a period of time with a view to carrying the protection of the policy when issued for twelve months, for a period in excess of that time. Continuation
clause

Special provision was made in the Finance Act, 1901, for this clause. It had previously been held that it was illegal to issue a policy for a longer term than twelve months. A continuation clause is defined as an agreement that in the event of the ship being at sea or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship or for a reasonable time thereafter, not exceeding thirty days. Additional stamp duty is payable on a policy containing a continuation clause.

(2) *Inchmaree Clause*. This clause is inserted in order to make the insurers liable for damage caused by accidents which do not come within the "perils of the sea" clause. clause The *Inchmaree* sustained damage to her donkey pump in filling her boilers, the damage being due to the neglect of the engineer to open a boiler valve. To test the liability of the underwriters an action was brought (*Thames & Mersey Marine Insurance Co. v. Hamilton* (1887)), and the House of Lords decided against the vessel. It is to overcome this decision that the Negligence or *Inchmaree* Clause is inserted in policies of marine insurance. The following is a form of the clause.

This insurance also specially to cover (subject to the Free of Average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull.

The clause must be construed strictly; it is a supplemental clause adding to the risks covered (*Stott (Baltic) Steamers, Ltd., v. Marten* (1916)).

Running
down or
collision
clause

(3) *Running Down or Collision Clause*. This clause is necessary on account of the fact that ports and riverways are so thronged with craft that collisions are frequently difficult to avoid. In the event of a collision the underwriters undertake to pay three-fourths of the claim against the owners; the other fourth the owner must bear himself, though in practice he usually insures the risk.

(4) *F.P.A. (Free of Particular Average) Clause*. This clause has already been referred to at page 344, *ante*, with reference to the Memorandum Clause in the statutory form. It is, however, not unusual to extend the *f.p.a.* clause in the memorandum by a clause to the following effect—

Warranted free from particular average under 3 per cent, but, nevertheless, when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby.

F.C. & S.
clause

(5) *F.C. & S. (Free of Capture and Seizure) Clause*. This clause exempts the insurer from liability in respect of loss or damage caused to goods, wares, merchandise, or vessel arising from capture and seizure. It extends the exemption of the insurer under the Restraint of Princes Clause.

Alterations in Policy. Once a policy has been executed it cannot be altered except with the consent of all parties because such alteration would amount to the making of a new contract. When an alteration is required it is usually effected by the endorsement of the policy, the signatures of all the parties being added.

In any case, on account of the provisions of the Stamp Act, 1891 (54 & 55 Vict., c. 39), no additional sum can be insured by means of an alteration in a policy, and any alteration must be made before the original risk has been determined; when the policy is a time policy, the period for which the insurance lasts must not be extended beyond six months when the policy was originally made for a less period than six months, nor beyond the year in any other case.

Kinds of Policies. The following are the principal kinds of policies of marine insurance—

(1) **VALUED POLICIES.** The agreed value of the subject-matter of the insurance is stated in the policies. This statement of value is conclusive between the parties in case of loss, even though it is in excess of the actual value of the subject-matter. As in all other contracts, fraud invalidates such policies. Ships and freights are generally so insured.

(2) **UNVALUED POLICIES.** In policies of this kind the value of the subject-matter is not stated, but is left to be proved by evidence if any loss occurs. Goods are usually insured in this manner, since their value can be easily ascertained.

(3) **FLOATING POLICIES.** A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

Such subsequent declaration may be made by endorsement on the policy or in other customary manner.

Unless the policy otherwise provides, the declaration must be made in the order of dispatch or shipment. It must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated.

Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

(4) **VOYAGE POLICIES.** The risk undertaken in voyage policies is confined to the particular voyages named

therein, e.g. London to Bombay, New York to Liverpool. See *Cornfoot v. Royal Exchange Assurance Corporation* (1904).

Time policies

(5) **TIME POLICIES.** These are made for fixed periods, not exceeding one year and thirty days in length. The additional thirty days were added to the length of time policies by sect. 11 of the Finance Act, 1901 (1 Edw. 7, c. 7). The risk undertaken is for any loss which may happen during the time that the policies remain in force, irrespective of the voyage or voyages undertaken.

Reference has already been made to policies containing provisions that no further proof of interest shall be required than the policy itself, and it has been pointed out that such policies are illegal (see page 339, *ante*). Such policies are known as P.P.I. (policy proof of interest) policies or "honour" policies.

Warranties. For their own protection underwriters stipulate for the insertion of certain express warranties in the policy, and a breach of any of them will absolve the insurers from liability in case of loss. But apart from special warranties there are certain implied warranties which have the same force legally as though they were set out in the policy. These implied warranties are two in number, and their purport may be expressed as follows—

Implied warranties

(1) In every voyage policy it is implied that the vessel shall be seaworthy at the time when the risk commences, or, if the voyage is divided into distinct stages, at the commencement of each stage.

(2) The adventure shall be legal in all respects, and the vessel shall carry proper documents evidencing the legality of the enterprise.

The question of seaworthiness has already been dealt with, and the provisions of the Carriage of Goods by Sea Act, 1924, with reference to that matter should be borne in mind (see page 316, *ante*). The second implied warranty is part of the general law of contract, a ship must not engage in an unlawful trade.

Unless a warranty is strictly complied with, an underwriter is entitled to avoid the policy in any circumstance

whatever. It goes to the foundation of the contract. It is quite immaterial that a loss arises irrespective of the breach of warranty, or that the insured had nothing to do with such breach. In the Marine Insurance Act, 1906, the term "warranty" is used as synonymous with "condition." If a warranty is not complied with the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date (sect. 33).

Non-compliance with a warranty is excused, however, when by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by subsequent law.

Breach of
warranty
excused

A breach of warranty may be waived by the insurer.

A representation should be distinguished from a warranty. A contract of marine insurance is only avoided where the representation is material, see page 341, *ante*, but materiality does not enter into the question where a breach of warranty is involved.

Representations and warranties

Deviation and Delay. Where a ship, without lawful excuse deviates from the voyage contemplated by the policy the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs. Deviation takes place where the course of the voyage is specifically designated and that course is departed from or where the course of the voyage is not specifically designated and the usual and customary course is departed from.

Deviation

The intention to deviate is immaterial, there must be a deviation in fact to discharge the insurer from liability (sect. 46).

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unusual (sect. 48).

Delay

Excuses for
deviation
and delay

Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(1) Where authorised by any special term in the policy, or

(2) Where caused by circumstances beyond the control of the master and his employer ; or

(3) Where reasonably necessary in order to comply with an express or implied warranty ;

(4) Where reasonably necessary for the safety of the ship or subject-matter insured, or

(5) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger ; or

(6) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship ; or

(7) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

Barratry includes every wrongful act wilfully committed by the master and the crew to the prejudice of the charterer or of the owner of the ship, and done without the connivance of the charterer or the owner. It is not necessary that the act should be done with intent to injure the charterer or owner, nor that the act should be intended to benefit the master or mariners (*Earle v. Rowcroft* (1806)). Examples of barratry are scuttling the ship, running her ashore intentionally, setting fire to her, etc.

When the cause which excuses the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch (sect. 49).

Alteration
of port of
departure or
destination

Where the port of departure or destination is fixed by the policy the risk does not attach if the ship sails from any other place or for any other destination. Similarly, where after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, then unless the policy otherwise provides the insurer is discharged from liability as from the time when the determination to "change the voyage" is first manifested.

Assignment of Policy. A marine policy is assignable unless it contains terms expressly prohibiting assignment.

It may be assigned either before or after loss.

After assignment the assignee has a right to sue on it in his own name, and the defendant may make any defence which he would have been entitled to make if the action had been brought by or on behalf of the assignor (sect. 50).

The policy may be assigned by endorsement or in any other customary manner.

Although a policy can be assigned after loss, an assignment is inoperative if the assured has parted with or lost his interest in the subject-matter insured, and has not either before or at the time of parting with his interest, agreed to assign the policy.

Loss. A loss may be either total or partial. A total loss may be either actual or constructive (sect. 56.)

Kinds of loss

Total Loss. Where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss. An actual total loss may be presumed where a ship is missing, and after a reasonable time no news of her is received.

Actual total loss

Apart from any express provision in the policy, there is a constructive total loss when the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. The fact that a ship insured and abandoned is restored after the commencement of an action upon the policy does not disentitle the owner to recover as for a total loss (*Ruys v. Royal Exchange Assurance Co.* (1897)).

Constructive total loss

Where there is a constructive total loss the assured may either treat the loss as a partial one or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss (sect. 61).

**Notice of
abandonment**

When the assured elects to abandon the subject-matter insured to the insurer he must give notice of the abandonment. If he fails to do so the loss can only be treated as a partial loss. No notice of abandonment is necessary, however, in the case of *actual* total loss.

Notice of abandonment may be in writing or by word of mouth, but it must be given with reasonable diligence after the receipt of reliable information of the loss. When notice of abandonment is accepted by the insurer, the abandonment is irrevocable. Notice may be waived by the insurer, and it is unnecessary where at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him (sect. 62).

**Effect of
abandonment**

Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured and all proprietary rights incidental thereto.

**Kinds of
partial loss**

Partial Loss. A partial loss is any loss other than a total loss. It is important where there is a partial loss to determine whether the loss is a particular average or a general average loss.

**General
average loss**

A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice. There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. (See further page 501, *post*, as to general average and the York-Antwerp Rules.)

Where there is a general average loss the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

**Particular
average loss**

A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against and which is not a general average loss. A particular

average differs from a general average in that while in general average the loss is borne proportionately by all whose interests are concerned and on whose account the sacrifice was made, in the case of particular average the loss remains where it falls, and if the subject-matter of the loss is insured, the insurer must indemnify the assured to the extent of the loss.

Liability of Insurer for Loss. The insurer is, as a general rule, liable only for any loss proximately caused by a peril insured against (sect. 55). He is, in particular, not liable for loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides he is liable for loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew. Moreover, unless the policy otherwise provides he is not liable for loss proximately caused by delay, even though the delay was caused by a peril insured against; nor is he liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice of the subject-matter, nor for any loss proximately caused by rats or vermin, nor for injury to machinery not proximately caused by maritime perils.

Misconduct
of insured

Loss caused
by delay

Wear and tear,
inherent
vice, etc.

Where there is a loss recoverable under a policy the insurer is liable for such proportion of the measure of indemnity (i.e. the amount recoverable) as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy or to the insurable value in the case of an unvalued policy (sect. 67).

Extent of
liability

In the case of a total loss, where the policy is a valued policy the amount recoverable is the sum fixed by the policy; if the policy is an unvalued one the amount recoverable is the insurable value of the subject-matter insured. This rule applies to ship, goods, or freight (sect. 68).

Total loss

In the case of partial loss, however, special rules must be applied. Where the ship is damaged but not totally lost, the amount recoverable, subject to any express provision in the policy is as follows—

Partial loss

(a) Where the ship has been repaired, the assured is

Damage
to ship

entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty. The customary deduction is one-third of the cost of new materials which the shipowner must bear because he gets the benefit of new materials. This deduction is not made on the first voyage.

(b) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs computed as in (a) above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage.

(c) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage computed as in (a) above.

Partial loss
of freight

The amount recoverable where there is a partial loss of freight is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy as the proportion of freight lost bears to the whole freight at the risk of the assured under the policy.

Partial loss
of goods, etc.

In the case of a partial loss of goods, merchandise, or other moveables, the amount recoverable, subject to any express provision in the policy is as follows—

(a) When part of the goods insured by a valued policy is totally lost the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(b) When part of the goods insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost ascertained as in case of total loss.

(c) When the whole or any part of the goods has been

delivered damaged, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value. Generally it may be said that "gross value" means wholesale price.

Where the voyage is interrupted by a peril insured against, under such circumstances as, apart from any special stipulation in the contract of affreightment to justify the master in landing and reshipping the goods, or in transshipping them and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transshipment (sect. 59).

Effect of
transshipment

Reference has already been made to the assured's right of contribution in the case of general average loss (see page 354, *ante*). The question of the liability of the insurer as dealt with in sect. 66, subsects. (4)–(6) of the Act must now be considered. Subject to any express provision in the policy, where the assured has incurred a general or general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

General
average loss

Where the assured has paid or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

In the absence of express stipulation the insurer is not liable for any general average contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

Rights of Insurer. When an insurer pays for a total loss of the subject-matter insured he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and

Right of
subrogation

Total loss

remedies of the assured in respect of that subject-matter as from the time of the casualty causing the loss (sect. 79); and see **Young v. Merchants' Marine Assurance Co.** (1932).

Partial loss

Where the insurer pays for a partial loss he acquires no title to the subject-matter insured, or such part of it as may remain, but he is subrogated to all rights and remedies of the assured in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified (sect. 79).

Right of contributor

Where the assured is over-insured by double insurance each insurer is bound to contribute to the loss in proportion to the amount for which he is liable under his contract, and if any insurer pays more than his proportion he is entitled to maintain an action for contribution against the other insurers. He is entitled to the remedies of a surety who has paid more than his proportion of a debt. If the assured has insured for an amount less than the insurable value or in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance (sects. 80 and 81).

Over-insurance

Under-insurance

Return of Premium. The premium may be returnable by agreement or on account of failure of consideration.

Total failure of consideration

Where the consideration for the payment of the premium totally fails and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

Partial failure of consideration

Where there is a partial failure of consideration, but the consideration is apportionable and the apportionable part totally fails, then a proportionate part of the premium is returnable to the assured. In particular the premium or a part thereof is returnable—

(a) Where the policy is void or is avoided by the insurer as from the commencement of the risk, provided that there has been no fraud or illegality on the part of the assured.

(b) Where the subject-matter insured or a part thereof has never been imperilled.

(c) Where the assured has no insurable interest throughout the currency of the risk, provided that the policy is not effected by way of gaming or wagering.

(d) Where the assured has over-insured under an unvalued policy.

(e) Where the assured has over-insured by double insurance, provided that if the policies are effected at different times and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly, no premium is returnable.

Stamping. Marine insurance policies must be stamped before issue as follows—

(a) For or upon any voyage—

	s	d.
Where the sum insured does not exceed £250	0	3
exceeds £250 but does not exceed £500	0	6
“ £500 “ “ £750	0	9
“ £750 “ “ £1,000	1	0
“ £1,000, for every £500 and any fractional part of £500	0	6

(b) For time —

where the insurance is made for any time not exceeding six months, an amount equal to three times the amount which would be payable if the insurance were made upon a voyage;

where the insurance is made for any time exceeding six months and not exceeding twelve months, six times the amount which would be payable if the insurance were made upon a voyage.

An additional duty of 6d. is charged where the policy contains a continuation clause (see page 347, *ante*).

Where the premium or consideration does not exceed the rate of 2s. 6d. per cent of the sum insured, the stamp duty is 1d.

CHAPTER XVI

SURETYSHIP AND GUARANTEE

Definition

THE contract of suretyship, or guarantee, is one in which a person undertakes to be answerable to another for the payment of a debt or the performance of some act on the part of a third person. The third person must be legally bound to pay the debt or to perform the act, and the surety, as the person giving the undertaking is called, is liable only on the failure of the principal, the debtor, to carry out his legal obligation. But this statement must be received with a qualification. Thus, if a person guarantees the price of goods supplied to an infant, the goods being other than necessities, the person who guarantees, though professing to contract as a surety, is responsible in law; for he would either be estopped from setting up the incapacity of the supposed principal, or he would himself be treated as such.

Guarantee for goods supplied to infant

Guarantee must be given to principal creditor

The guarantee must be given to the principal creditor and not to the debtor (*Eastwood v. Kenyon* (1840)).

The Statute of Frauds. By the fourth section of the Statute of Frauds, 1677, to which frequent reference has been made, it is necessary that a guarantee, an undertaking to answer for the "debt, default, or mis-carriage" of another, should be evidenced by writing.

Memorandum or note

There must be some memorandum of the kind already described at page 47, *ante*, and it must contain all the necessary particulars of the contract entered into. The existence of the written memorandum does not, of course, dispense with the necessity for a consideration.

Consideration

The consideration must be a valuable one, moving from the creditor, and satisfying the ordinary rules as to consideration. If the contract is under seal, that is, made by deed, there is no need for a consideration. In connection with this point the words of Best, C.J., in *Morley v. Boothby* (1825), should be noted: "No court of common law has ever said that there should be a consideration directly between the persons giving and

receiving the guarantee. It is enough if the person for whom the guarantor becomes surety receives a benefit, or the person to whom the guarantee is given suffers inconvenience, as an inducement to the surety to become guarantee for the principal debtor."

At one time it was necessary that the consideration for the guarantee should be set out in the memorandum, and it was the absence of any mention of the consideration which defeated the claim of the plaintiff in the well-known leading case of *Wain v. Warlters* (1804). But by sect. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), it is enacted :

Consideration need not appear in memorandum

"No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

The whole promise, however, must be in writing, although the consideration is absent, otherwise the memorandum will not be sufficient (*Holmes v. Mitchell* (1859)).

Guarantee or Indemnity. It is not always easy to determine whether an undertaking of this kind is a guarantee or simply an indemnity. The distinction is very clear in the leading cases of *Birkmyr v. Darnell* (1704), and *Mountstephen v. Lakeman* (1874), but in other cases it is much more difficult to arrive at a result. Yet it is most important to distinguish between the two, because whereas a guarantee requires evidence in writing, an indemnity needs no such authentication. Thus, in the case of *Guild v. Conrad* (1894), Conrad had orally agreed with Guild, that if he (Guild) would accept certain bills for a firm in which Conrad's son was a partner, funds would be found by Conrad to meet

Distinction between guarantee and indemnity

Writing unnecessary in case of indemnity

Examples

them. It was held that this undertaking was a promise on the part of Conrad to be liable primarily, and that, therefore, it was an indemnity needing no evidence in writing to make it enforceable by action. On the other hand, the case of *Harburg India Rubber Comb Company v. Martin* (1902), deserves the most careful attention. There the defendant, who was a director of and had a large interest as a shareholder in a company, which he had also financed, orally promised the plaintiffs, who were judgment creditors of the company, and who had delivered to the sheriff a writ of *fi. fa.* which they had issued upon their judgment, on which the sheriff had failed to levy because he could not effect an entry, that he (the defendant) would endorse bills for the amount of the debt. It was held that the promise was not a contract of indemnity, but a "promise to answer for the debt of another" within sect. 4 of the Statute of Frauds, and that as it was not in writing the plaintiff could not recover. It was further held that the case was not excepted from sect. 4 by reason of the interest which the defendant had as a shareholder and otherwise in freeing the goods of the company from the execution, he having no legal interest in or charge upon the goods. This last named case is further valuable for the elaborate classification and comparison of the numerous cases which have been before the courts as to the distinction between a guarantee and an indemnity.

The distinction is very clearly seen in such an illustration as the following: A and B enter a tailor's shop. A says to the tailor, "Make B a coat, and if he does not pay you I will." This is a guarantee, and the tailor cannot sue A upon it unless there is some memorandum in writing. But if A says, "Make B a coat and put it down to me," here A makes himself primarily liable, and there is no need for any writing.

Guarantee
requires prior
contract

It is clear that there can be no contract of guarantee, unless there is also a prior contract in existence, and that one of the parties to this contract, viz. the creditor, is also a party to the contract of guarantee. The principal debtor is the person liable on the first

contract, and the guarantor or surety is liable only on the second. See the remarks of Lord Selborne in *Mountstephen v. Lakeman* (1874).

Before the guarantee is binding upon the guarantor, it must be accepted by the person to whom it is offered. Otherwise the requirements for the formation of a simple contract are not fulfilled. Thus, in the case of *Mozley v. Tinkler* (1835), a gentleman wrote to a firm of publishers, stating his willingness to be answerable up to £50 for the cost of bringing out a certain book for another person. The publishers never replied to the letter, but brought out the book. In an action, which afterwards became necessary, it was held that the letter could not be treated as a guarantee, since the offer contained in it had never been accepted. But if the guarantee is an acceptance (e.g. in the example just given, if the publishers had written to the guarantor and the guarantee had then been sent in reply to the publishers' letter) no further communication between the parties is necessary.

Necessity for acceptance of guarantee

A guarantor can always revoke his offer to become a surety until it has been accepted.

Revocation of offer by guarantor

It has been decided, in *Scaton v. Burnand* (1900), that although a surety is entitled to be made well acquainted with all material facts, and although there must be neither fraudulent misrepresentation nor concealment, the contract of suretyship is not one of those which belong to the class *uberrimae fidei*. There are, however, many cases where there is an obligation to disclose material facts and where their concealment, though not fraudulent, will avoid the contract. In **Lee and Another v. Jones** (1864), the court said "a surety is, in general, a friend of the principal debtor, acting at his request and not at that of the creditor; and in ordinary cases it may be assumed that the surety obtains from the principal all the information which he requires. But when the creditor describes to the proposed sureties the transaction proposed to be guaranteed, that description amounts to a representation that there is nothing in the transaction that might

Whether *uberrimae fidei*

not naturally be expected." A very good example of the duty to disclose is provided by the case of *London General Omnibus Co., Ltd. v. Holloway* (1912), where the employer of a servant when taking a bond from another which purported to make him responsible as surety for the fidelity of the servant did not disclose to the surety the fact that the servant had previously been guilty of dishonesty in his employment, the employer could not enforce the bond against the surety in respect of subsequent dishonesty of the servant, although the non-disclosure was not fraudulent. The case was distinguished from one where there was a guarantee to secure an overdraft at a bank on the ground that there was no obligation to disclose that there was already an overdraft, as it would only be necessary to secure a guarantee if there was about to be one.

Stamp

A guarantee, like any other agreement under hand, requires a sixpenny stamp. The document must be stamped within fourteen days of the date of the guarantee.

Where
liability not
specified in
contract

Liability of the Surety. The contract itself, if properly made, will state the amount of the liability of the surety, and will generally further specify any conditions precedent to the creditor's suing the guarantor on default being made by the principal debtor. In the absence of any such conditions, the creditor can sue the surety at once, even before or without suing the principal debtor, and need give no notice to the surety nor make any preliminary demand from him. A judgment against the principal debtor is neither judgment nor evidence against the surety. The plaintiff must bring a fresh action against the surety. And the latter is not estopped from raising defences which were not raised on the hearing of the action against the debtor (*Ex parte Young* (1881)). A surety is not bound by any admissions made by the principal debtor in the first action (*Evans v. Beattie* (1803)).

Time

The extent of the liability of the guarantor, in point of time, will depend upon the terms of the contract. It

may extend to a single transaction, or cover transactions spread over a considerable space of time. The latter are called "continuing guarantees." The decisions of the courts upon the subject whether a guarantee is or is not a continuing one run remarkably close, and it is very difficult to distinguish some of them. No general rule of construction can be laid down, and each case must be decided upon its own facts. As to what have been held to be continuing guarantees reference may be made to *Mason v. Pritchard* (1810); *Hargreave v. Smea* (1829); *Simpson v. Manley* (1831); *Allan v. Kenning* (1833); *Mayer v. Isaac* (1840); *Hitchcock v. Humfrey* (1843); *Martin v. Wright* (1845); *Wood v. Priestner* (1867); *Heffield v. Meadows* (1869). In *Mason v. Pritchard* (1810), the words of the guarantee were: "for any goods he hath or may supply W. P. with to the amount of £100." This was held a continuing guarantee. In *Mcville v. Hayden* (1820), a distinction was drawn on the ground that in the latter case the words "for any goods" did not appear. In *Heffield v. Meadows* (1869) a guarantee in the following form was held to be a continuing guarantee on the ground that it appeared that the parties contemplated a continuing supply of stock: "I, A, will be answerable for £50 sterling that B, butcher, may buy of H."

Continuing
guarantees

Examples

If a surety becomes bankrupt, the creditor can prove against his estate in the bankruptcy for the amount of his guarantee.

Bankruptcy of
surety

Rights of the Surety. When the surety has become absolutely liable upon the guarantee, he has the following rights—

(1) *Against the Principal Debtor.* He can recover all moneys properly paid under the guarantee, together with interest upon the same, or, if no moneys have been paid, he can take proceedings to compel the principal debtor to exonerate him from liability.

Against
principal
debtor

(2) *Against the Principal Creditor.* In return for discharging the debt due under the guarantee, the surety has a right to be placed in the same position towards the principal debtor as the creditor is. All securities

Against
principal
creditor

and other rights, such as judgments, must be transferred to him. This right was given to sureties by sect. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict., c. 97), which is as follows—

“Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or debts, whether such judgment, specialty, or other security shall or shall not be deemed, at law, to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable.”

It is immaterial under the Act whether the surety has, or has not, obtained an actual assignment of the judgment (*In re McMyn* (1886)). If a surety has been called upon to pay a Crown debt which is due from the principal debtor, he takes the place of the Crown and is entitled to the same rights of priority which the Crown enjoys over other creditors (*In re Lord Churchill* (1888)).

(3) *Against Co-sureties.* When the contract of guarantee is entered into by several sureties, any one of the latter, on paying the amount fixed by the guarantee,

can obtain contribution from his co-sureties. See *Dering v. Lord Winchelsea* (1787). And this right of contribution is not affected by the fact that the sureties are bound by different instruments. If, however, the various sureties are bound in varying amounts, they must contribute proportionally to the amount guaranteed, and not equally. The important judgment of Lord Russell, C.J., in *Ellesmere Brewery Co. v. Cooper* (1896), should be studied upon this point. In reckoning the number of sureties, when there are several, only those are counted who are able to pay. At law this was not so. Thus, if there were three co-sureties, and one of these died or became insolvent, and one of the number paid the whole amount due under the guarantee, he could not recover from the third co-surety more than one-third of the amount (*Brown v. Lee* (1827)). In equity it was not so. Therefore, in the example just given a surety could have recovered in equity one-half of the amount, and not one-third only (*Peter v. Rich* (1830)). The rule of equity now prevails (Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), sect. 44 replacing the Judicature Act, 1873). In return for his liability to pay his share upon a guarantee, a co-surety can call upon any of his fellow sureties to give up or give credit for any securities which such surety may have obtained. The object of this is to divide the loss which has been sustained equitably amongst the co-sureties (*Steel v. Dixon* (1881)).

Release of the Surety. On the general principles of the law of contract, total failure of the consideration for which it is given will render a guarantee absolutely void. Similarly, a guarantee is voidable on the ground of fraud or misrepresentation. The surety, moreover, may be released in any of the ways in which a contract may be discharged (see page 95, *ante*). For example, he is discharged by the failure of the creditor to observe a condition of the contract (***Eshelby v. Federated European Bank, Ltd.*** (1932)). The question of non-disclosure which is not fraudulent avoiding contracts

Rules of
contract
apply

of guarantee has already been referred to at page 363, *ante*.

Alteration
in terms
between
creditor and
debtor

In addition, there are several other ways in which a surety may be released. The most common of these is an alteration in the terms of the contract between the creditor and the debtor behind the surety's back. The law on the subject was thus summed up in *Holme v. Brunskill* (1877), by Cotton, L.J.: "The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that, in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

A good illustration of the way in which a material alteration will release a surety is to be found in the case of *Ellesmere Brewery Co. v. Cooper* (1896), to which reference has already been made. A joint and several bond of suretyship was executed by four persons. By the terms of the instrument the liability of two of them was limited to £25 each, and of the other two to £50 each. One of the latter, after the other three had executed the bond, executed it himself, but added the words "£25 only" to his signature. The creditor accepted the bond without objection. On the default of the principal debtor it was held, in an action brought by the creditor, that the bond had been materially

altered, and that the first three sureties were discharged from all liability under it.

The forfeiture by a company of the shares of a principal debtor constitutes an interference with the rights of a surety who has guaranteed payment of instalments owing upon the shares in that it substitutes a fresh and more onerous liability and deprives him of his equitable right of lien upon the shares. He is therefore discharged (*In re Darwen & Pearce* (1927)).

In *Guy-Pell v. Foster* (1930), the plaintiff subscribed for debentures in a company at £80 per £100, such debentures being redeemable at par at a subsequent date. The defendant agreed to indemnify him against loss in return for a proportion of the profit made. The plaintiff sold the debentures before the date of redemption for £25 apiece. The company then went into liquidation and the plaintiff re-purchased the debentures. The court held that the defendant was no longer liable on his guarantee. There was a duty on the plaintiff to retain the debentures, and their sale amounted to a breach of an implied term of the contract which entitled the defendant to treat it as at an end.

Again, a surety is discharged if the creditor binds himself to give time to the principal debtor, unless by such agreement the creditor reserves his rights against the surety (*Rees v. Berrington* (1795); *Croydon Gas Co. v. Dickinson* (1876)). The reason for this is that the creditor has deprived the surety, for the time being, of the opportunity of considering his position and pursuing his remedies against the debtor, remedies which may be lost if an extension of the period of liability is granted (*Polak v. Everett* (1876)). But mere forbearance or delay in suing will not discharge a surety (*Rouse v. Bradford Banking Co.* (1894)). In *Midland Motor Showrooms v. Newman* (1929) the question was discussed as to whether an agreement to give time for the payment of the arrears of instalments under a hire purchase agreement operated to discharge the surety not only from any liability in respect of those instalments, but also from any further liability in respect of

Giving
time to
principal
debtor

Hire purchase

the whole contract. The court held that the surety was altogether discharged where the agreement was one and indivisible (as in the case of the hire of a motor car). The case was, however, distinguished from *Croydon Gas Co. v. Dickinson* (1876), where there was a contract for the sale and purchase of goods to be delivered and paid for monthly, and it was held that the giving of time to pay for one month's supply operated to discharge the surety only in respect of the payment for that month's supply.

Fidelity
guarantee

In the case of what is called a "fidelity guarantee," that is, a guarantee by which a surety is made responsible for the honesty of a person employed in a particular office, the guarantee only continues, unless otherwise agreed, as long as the duties of the office or appointment remain the same. Moreover, an employer cannot claim under a guarantee if he does something which is distinctly injurious to the interests of the surety, e.g. regularly throws temptations in the way of his servant (*Smuth v. Bank of Scotland* (1813) 1 Dow, 272). But a surety will not be discharged if an employer is merely passively inactive. If, however, it is discovered by an employer that his servant has been guilty of any act of dishonesty, it is his duty to inform the surety of the fact, and the latter is then entitled to withdraw from his contract. Upon this particular subject the following cases should be consulted, *Burgess v. Eve* (1872), *Phillips v. Foxall* (1872); *Sanderson v. Aston* (1873); *Guardians of Mansfield Union v. Wright* (1882); *Mayor of Durham v. Fowler* (1889); see also *London General Omnibus Co. v. Holloway* (1912), referred to at page 364, *ante*.

Release of
principal
debt

The release or satisfaction of the principal debt at once puts an end to a contract of guarantee. In the course of the judgment in *Commercial Bank of Tasmania v. Jones* (1893), it was said, "It may be taken as settled law that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because

the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute." The same is true if the creditor accepts a fresh security from the debtor which is of such a nature as to act as a merger of the old security. Although a novation by which the original debtor is released from his debt discharges the surety, a transfer of an existing and ascertained debt to another creditor stands on another footing (*Bradford Old Bank v. Sutcliffe* (1918)).

A surety will be freed from all liability on his guarantee if the creditor fails to take proceedings against him within the time fixed by the Statute of Limitations, that is, within six years in the case of a simple contract, or within twenty years if the contract is under seal. No cause of action arises against a surety, however, until demand has been made, so that time does not begin to run in favour of the surety until demand (*Bradford Old Bank v. Sutcliffe* (1918)).

Statute of
Limitations

A continuing guarantee is not necessarily revoked by the surety's death (*Bradbury v. Morgan* (1862)), but notice of the death is sufficient to revoke the guarantee as to future advances (*Coulthart v. Clementson* (1879)). But this is not so where the guarantee is of such a nature that the consideration is given once for all, e.g. admission as an underwriter at Lloyd's, and is not revocable during the lifetime of the guarantor (*Lloyd's v. Harper* (1880)). In *Bradford Old Bank v. Sutcliffe* (1918) the court held that the liability of a surety under a continuing guarantee is determined by his lunacy as it would be by his death, and that this is so although there is a general provision that it shall not be determined except on the surety or his representative giving three months' notice.

Continuing
guarantee

Guarantee
for firm

When a guarantee is given for a firm, it ceases to be binding after a change has been made in the constitution of the members of the firm, unless it is made quite clear that the guarantee is to continue in spite of the change. See the Partnership Act, 1890 (53 & 54 Vict., c. 39), sect. 18.

When action
lies

Action for Deceit. Closely connected with suretyship and guarantee, though belonging to the law of tort and not to that of contract, is the right of action for what is known as deceit. It arises when a person has made a fraudulent representation as to the credit of another, and a third party has acted upon such representation and suffered loss. To maintain such an action it is necessary for the plaintiff to prove that the false representation was made with fraudulent intent, and that such false representation was the cause which induced him to act to his prejudice. By the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act) (9 Geo. 4, c. 14), sect. 6, any representation as to the "conduct, character, credit, or ability" of another must be made in writing, and signed by the person making it; no action will lie if the representation is not in writing even though it was false and fraudulent.

PART IV SECURITIES

CHAPTER XVII

SECURITIES GENERALLY

THE object of a security is to give a certain right or interest to a creditor, whereby he is able to recover the amount of the debt which is owed to him more easily than by an action at law, if the debtor is in default. It further guards a creditor against a partial or total loss, unless the security turns out to be less valuable than was anticipated, because, as not unfrequently happens, a judgment obtained against a debtor is unproductive. For example, upon a sale of goods if the seller parts with the possession of the goods and the property has passed to the purchaser, the only ordinary remedy of the creditor is a personal one against the debtor. Whilst the period of credit is running the debtor may become hopelessly insolvent, and the creditor be left to take his chances. But if he has taken something from the debtor which he can convert to his own use in the case of certain eventualities, he has something tangible to turn to in order to satisfy himself, and to prevent the loss which would otherwise fall upon him.

Object of
security

As has been noticed, goods are transferred from one person to another by mere delivery for a consideration, or by deed if there is no consideration. They may also be safely handed over as a gift, and the property in them will at once rest in the transferee, provided there is no fraud in the transfer, and the gift is not made for the purpose of defeating creditors. And for a debt which is owing, a creditor may take an equivalent in value in the shape of goods. It has been pointed out on several occasions already that *choses in action* are assignable, both in equity and by various Acts of Parliament and

Security on
goods without
transferring
possession

especially by the Law of Property Act, 1925, sect. 136. There is no difficulty occasioned by the mere transfer of the possession of documents of title to goods or other things. It is one of the commonest practices of banks to lend money upon the deposit of title deeds, bills of lading, shares, etc. The transaction can be carried through quickly and easily. The accommodation required may be of a mere temporary character, and the securities can be handed back as soon as the debt is repaid. But it is altogether different when the security takes the form of a charge upon or over goods and chattels. It is often extremely inconvenient for a business man to divest himself of his goods by handing them over to a creditor absolutely. It may cripple his business, for the goods may form the most valuable part of his capital. It is, therefore, desirable that a debtor should remain in possession of the goods, and yet be able to borrow money upon the security of them. For the reasons given above a lender may very naturally object to advance money and simply stand in the position of an ordinary creditor. He wants some security, and if he cannot obtain the possession of documents of title of the kind mentioned when money is advanced by banks or other similar institutions, his object is to get some right or interest in the goods of the borrower, by means of which he can be assured that he will not be the loser in any event. This is generally effected by a mortgage, or a bill of sale. The legal ownership in the goods is, by such an instrument, conferred upon the lender, and if the borrower or debtor is in default, there arise certain rights which the creditor can exercise without any interference on the part of other ordinary creditors. The holder of such a security is called a "secured creditor." The position of a secured creditor is stated more fully in the chapter on Bankruptcy.

Mortgage and
bill of sale

Secured
creditor

Pledge

Again, the borrower may be willing to part with the possession of his goods for a fixed period, knowing that he has no pressing present need of them. This is effected by means of what is called a "pledge." Here, however, the property or ownership in the goods remains with the

debtor, although the possession of them has been transferred to the creditor. But in certain cases the creditor acquires a right to sell the goods pledged.

Lastly, a creditor may come into possession of goods lawfully, and be entitled to make certain charges for work or labour bestowed upon them or done in connection with them. Until these charges are paid he is entitled to hold the goods, and is said to have a "lien" upon them. Lien

Mortgages, pledges, and liens are the principal securities on property, and they are those which are dealt with in the present chapter. The securities called debentures have already been noticed in the chapter on Companies. Debentures

As distinguished from a security on property, the term "personal security" simply indicates the right which one person has to sue another for the recovery of a sum of money which is due, and which the second person has undertaken to pay. A common kind of personal security is a bond. "Personal security"

CHAPTER XVIII

MORTGAGES

Definition

A MORTGAGE may be defined as a conveyance of an interest in property to secure the repayment of a sum of money, with an implied condition that the interest shall be reconveyed or extinguished when the sum is repaid. The borrower is called the "mortgagor," and the lender the "mortgagee."

Property of any kind may be the subject of a mortgage, but the name is generally confined to those cases where land, or an interest in land, is that to which the creditor looks for securing his debt to him. A mortgage of goods is called a "bill of sale."

How created

Legal Mortgages. A mortgage is either "legal" or "equitable." By a legal mortgage a legal interest in the land is granted to the lender in consideration of a sum of money, which the mortgagor covenants to repay upon a certain day, generally six months after the date of the loan, together with interest at a specified rate. It is made by deed. If the money is repaid, the mortgagee is bound to surrender the interest in the land to the mortgagor. Prior to 1926 a mortgage was created by transferring the whole of the mortgagor's interest to the mortgagee. By sect. 85 of the Law of Property Act, 1925, however, a legal mortgage of an estate in fee simple can be effected only by a demise for a term of years absolute subject to a provision for cesser on redemption. Leaseholds similarly are mortgaged by the creation of a sub-lease for a term less by one day than the original lease. In practice, it is seldom the intention of the parties to create a debt which is to exist for six months only. The lender is probably a man who desires a more or less permanent investment for his money, and the borrower is equally desirous of having the use of the money which he has borrowed for a considerable period. The mortgage deed, therefore, invariably contains a further covenant on the part of the mortgagor to continue to pay interest at a fixed rate as long as the

mortgage is in existence. After the stipulated period has passed a mortgagor can always redeem by giving proper notice to the mortgagee and repaying the amount due with interest. This right to redeem after the time fixed by the deed for redemption has passed is called the mortgagor's "equity of redemption." The costs incidental to mortgage transactions are almost always paid by the mortgagor. On the other hand, the mortgagee can demand on notice repayment of his debt at any time after it has become due. The mortgagor must then redeem, or procure another lender who will be willing to advance the money required when the mortgage will be transferred to the new lender by the original mortgagee. If no transfer is made, and the debt is not repaid, the mortgagee has various remedies open to him for enforcing his rights. Some of these are given by the mortgage deed, while others are conferred by the Law of Property Act, 1925. The principal of these, and the only ones which need be noticed here, are foreclosure, sale, and appointment of a receiver.

Powers of
mortgagor or
mortgagee

Foreclosure signifies the taking of certain proceedings at the conclusion of which the mortgagee becomes owner of the land freed from any right of the mortgagor to redeem it at any time. Instead of seeking foreclosure, however, the mortgagee more frequently proceeds either to the appointment of a receiver or to the exercise of his power of sale.

Foreclosure

By his power of sale the mortgagee is empowered to sell the land under certain conditions, to deduct the amount due to him for debt, interest, and costs, and to hand the balance, if any, to the mortgagor. If the amount realised by the sale is not sufficient to repay the debt due to the mortgagee, the mortgagor is still liable for the balance under the covenant to repay contained in the mortgage deed.

Sale

By sects. 85 and 86 of the Law of Property Act, 1925, a new form of mortgage has been introduced in addition to the form by demise or sub-demise, viz. a charge by deed expressed to be by way of legal mortgage. Where such a mortgage is created the mortgagee has

Charge by way
of legal mort-
gage

the same protection, powers and remedies as in the case of a mortgage by demise or sub-demise.

Equitable Mortgages. When the title deeds of the property which is mortgaged are handed to the mortgagee, either with or without some note or memorandum of the transaction, and neither a demise made for a term of years nor a charge created by way of legal mortgage, but only a charge created, the mortgage is called an equitable mortgage. Equitable mortgages are exceedingly common in commerce, on account of the ease with which a loan can be effected by the mere deposit of title deeds. The ordinary remedy of the equitable mortgagee is foreclosure, though further relief may be gained by an application to the courts.

An equitable mortgage is not the most satisfactory of securities if the loan of money is required to stand over for any considerable length of time. In addition to the limited power of realising the value of the security, there is always the danger of an equitable mortgagee being displaced by a legal mortgagee. It is, therefore, essential for a person who lends money by way of equitable mortgage to secure possession of the title deeds, and not to part with them until his money has been repaid.

Necessity for
possession of
title deeds

Mortgages of Choses in Action. It is a common practice to borrow money on the security of *choses in action*, particularly policies of life insurance and shares in joint stock companies. This may be effected either by deed, or by a deposit of the securities with an accompanying memorandum referring to the deposit. Notice of the mortgage should be given to the persons by whom the money represented by the securities is payable. The remedies are the same as in the case of a mortgage of land, viz. foreclosure and sale.

Necessity for
notice

Liabilities of
mortgagee

A mortgagee of a *chose in action* should take particular care to examine what liabilities are attached to the holding of the securities upon which the loan is made. For example, if shares in a joint-stock company are mortgaged and the shares are not fully paid up, the mortgagee may be responsible for calls.

CHAPTER XIX

BILLS OF SALE

THE mortgage of goods, generally called a bill of sale, may be defined as a deed which passes the right and property in goods and chattels from one person, called the grantor, to another, called the grantee. The security is given for the consideration set forth in the bill of sale, and the covenants in the deed set forth the conditions upon which the grantor is enabled to redeem the security, and to have the property reconveyed to him.

Definition

Legislation Governing Bills of Sale. The object of the legislation as to bills of sale has been to prevent the secret and fraudulent alienation of property, and the consequent deception of unsecured creditors. If a person actually transferred his goods to another, no harm was done to anybody. But if he gave a charge over them and still remained in possession, he might be able to appear to the world at large as a person of means and substance, and to incur liabilities which he had no chance of meeting. So long as this state of things existed the door was open to fraud. Not every case of a transfer of the property in goods and the retention of the possession of them necessarily indicated a fraudulent intent, but as it was obvious that the retention of possession was not altogether consistent with the nature of the transaction, the Bills of Sale Act, 1854 (17 & 18 Vict., c. 36), was passed which first made registration of bills of sale compulsory. This Act was supplemented by an amending statute of 1866 (29 & 30 Vict., c. 96), which required that the registration should be renewed every five years. These two Acts have now been repealed, and the principal statutes in force are those of 1878 (41 & 42 Vict., c. 31) and 1882 (45 & 46 Vict., c. 43), with the two amending statutes of 1890 (53 & 54 Vict., c. 35) and 1891 (54 & 55 Vict., c. 35).

Object of statutes

The two principal Acts (the Bills of Sale Act, 1878,

and the Bills of Sale Act (1878) Amendment Act, 1882), are commonly referred to as the Bills of Sale Acts. It is necessary for several reasons to consider the two Acts together in order to understand their provisions. But the fact must not be lost sight of that the objects of the two are quite dissimilar. The former was passed for the protection of creditors, by preventing persons obtaining credit when in the apparent possession of goods which were the property of another. The latter was passed in the interest of the borrowers themselves, as it was found that needy persons were in the habit of borrowing money and binding themselves by documents of which they did not comprehend the meaning.

It is to be remembered carefully that the Bills of Sale Acts deal with documents and not with transactions (*North Central Wagon Co v. Manchester, Sheffield & Lincolnshire Railway Co.* (1888)). If, therefore, a transferee can make out a good title to goods without any reference being made to any document concerning them, the Acts have nothing to do with the matter. Thus, in *Ramsay v. Margrctt* (1894), a wife, who had separate estate, agreed to purchase some goods from her husband. The goods were the property of the husband and were in the house where the parties were living together. The wife stipulated that she should receive a receipt for the purchase money, and this receipt was drawn up by the wife's solicitor and signed by the husband. The document acknowledged the receipt of the agreed sum from the wife as purchase money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband, but they remained at the house. Subsequently part of the goods were sent by the wife to her bankers and the remainder were seized under an execution. In an interpleader issue between the wife and the execution creditor it was held that the receipt, in spite of the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but that the

property had passed to her by the prior and independent bargain, and that consequently the receipt did not require registration under the Bills of Sale Act, 1878, and that the wife was entitled to the goods as against the execution creditor. It was also held that the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.

Amongst the many cases which deal with this point reference should be made to *Maas v. Pepper* (1905), in which the real nature of the transaction was looked at by the court and the form of the document ignored.

It cannot be too strongly impressed upon the minds of all people that any transactions in connection with bills of sale which are not carried out through the medium of a solicitor are likely to end in trouble and disaster. The Acts are too strict in their requirements to permit of any trifling with their provisions.

Bills of Sale Act, 1878. This Act does not deal exclusively with documents relating to sales. The term "bill of sale" is defined, by sect. 4, to include "assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

Definition of
bill of sale

The following documents are, however, declared by the Act not to be included—

Documents
not included

(1) Assignments for the benefit of the creditors of the person making or giving the same. The assignment must be for all creditors (*Boldcro v. London & Westminster Loan Co.* (1879); *Hadley v. Beedom* (1895)).

(2) Marriage settlements (i.e. ante-nuptial settlements (*Wenman v. Lyon* (1891)).

(3) Transfers or assignments of any ship or vessel or any share thereof.

(4) Transfers of goods in the ordinary course of business of any trade or calling. An agreement for the sale of growing crops is a "transfer of goods in the ordinary course of business of any trade or calling" (*Stephenson v. Thompson* (1924)).

(5) Bills of sale of goods in foreign parts or at sea.

(6) Bills of lading, warehouse keepers' certificates, warrants, or orders for the delivery of goods (see *Grigg v. National Guardian Assurance Co.* (1891)), or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

The Act, moreover, does not apply, by reason of sect. 17 of the Act of 1882, to

(7) Mortgages, charges, and debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company (*In re Standard Manufacturing Co.* (1891); *Richards v. Kidderminster Overseers* (1896)). But the exception does not extend to the debentures of a society registered under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict., c. 39) (*In re North Wales Produce & Supply Co.* (1922)).

The Bills of Sale Act, 1891, provides another exception, viz—

(8) "An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument.

(9) By sect. 8 (1) of the Agricultural Credits Act, 1928 (18 & 19 Geo. 5, c. 43), an agricultural charge is to have effect notwithstanding anything in the Bills of

Sale Acts and is not to be deemed to be a bill of sale within the meaning of those Acts.

Personal chattels which may be included in a bill of sale mean goods which are capable of complete transfer by delivery, also fixtures and growing crops assigned separately from the buildings or land to which they are attached. Trade machinery is included, whether assigned together with, or separately from, the building to which it is attached, with the exception of certain fixed motive power, machinery, pipes, etc., which are declared not to be personal chattels under the Act. Stocks, shares, and *choses in action* are not included in personal chattels.

It should be particularly noted that the Act of 1878 applies only to absolute bills of sale, though formerly it applied to all bills of sale; its provisions regarding bills of sale by way of security are re-enacted in the Act of 1882.

Requisites and Form of Absolute Bills of Sale. Absolute bills of sale must be (a) duly attested, (b) registered within seven days, (c) accurate in the statement of the consideration for which they are given.

The attestation of the execution must be by a solicitor, and it must state that before the execution took place the effect of the bill of sale had been explained to the grantor by the attesting solicitor. It is in respect of the attestation that there exists a difference between the Acts of 1878 and 1882. Registration is made in the central office of the High Court of Justice within seven clear days after the execution of the bill of sale. The original bill is presented to the registrar, together with every schedule or inventory annexed to it. See *Davidson v. Carlton Bank* (1893). A true copy is filed (*Coates v. Moore* (1903)), and also an affidavit of the time when the bill was given, of its proper execution and attestation, and a description of the grantor and every attesting witness. Registration must be renewed at least every five years or the bill of sale will become void. If, by any inadvertence, a bill of sale is not duly registered or re-registered, the time for registration or re-registration may be extended by a judge of the High Court,

Attestation

Registration

unless the vested rights of third parties are in any way affected. Thus, where after the time had expired for renewing the registration of a bill of sale the grantor was adjudged bankrupt, and no application had been made for any rectification of the error, it was held that the time for renewal of registration could not be extended so as to defeat the rights of the trustee in bankruptcy, in whom the property of the grantor had vested (*In re Parsons* (1893)). A transfer or an assignment of a registered bill of sale need not be registered. And if the grantee of a duly registered bill of sale has himself given a bill of sale in respect of the goods which are comprised within his own bill, there is no necessity for the original bill of sale to be re-registered at the end of every five years (*Antoniadis v. Smith* (1901)).

Consideration

The consideration for which the bill of sale is given must be clearly set forth, and great care must be taken that this is done with accuracy. Still, it is sufficient if its true legal effect or its true business effect is stated. The consideration may be a pre-existing debt. See *Richardson v. Harris* (1889); *Darlow v. Bland* (1897); *In re Wiltshire* (1900); *Davies v. Jenkins* (1900).

Defeasance

Any agreement which enables the bill of sale to be avoided (called "defeasance" in the Act), any condition, or any declaration of trust, subject to which the bill of sale is given, must, unless it is contained in the body of the bill, be written on the same paper as the bill before registration, and be set out in the copy filed for registration, otherwise the registration will be void. See *Counsell v. London & Westminster Loan Co.* (1887), *Thomas v. Searles* (1891); *Heseltine v. Simmons* (1892); *Edwards v. Marcus* (1894).

Effect of non-compliance with statute

The Act of 1878 provides that a bill of sale shall be void against the trustee in bankruptcy, or an execution creditor of the grantor, so far as regards goods contained in it and still remaining in the possession of the grantor, unless the above requisites have been complied with. Non-compliance does not make the bill of sale void for other purposes. For example, the grantee has a good

title against the grantor, even though there has been no registration.

Bills of Sale Act, 1882. The bills of sale dealt with by this Act, which is, as has been stated, supplementary to the Act of 1878, are conditional (i.e. by way of security), and may be defined as those which pass the goods of the grantor to the grantee, subject to a condition for re-vesting them in the grantor upon the performance of the condition imposed, viz. repayment of the money lent.

Conditional
bills of sale
defined

Requisites and Form of Conditional Bills of Sale. If the conditional bill of sale does not comply with certain requisites and forms it is absolutely void, not only as regards other creditors of the grantor, but as between the grantor and the grantee themselves. The principal of these are—

(1) The bill of sale must be made in accordance with the form given in the schedule of the Act. Though it is not necessary that the words used should be exactly the same, they must at least produce the same legal effect, and they must be so set forth as not to deceive any reasonable person as to their exact meaning.

Form of bill

In *Thomas v. Kelly* (1888) the court held that the 9th sect. of the Act enacts not only what a bill of sale must contain, but also what it must not contain, so that bills of sale of personal chattels as security for money are prohibited unless the form given in the schedule is appropriate. A divergence becomes substantial or material, however, only when it is either calculated to give the bill a legal consequence either greater or smaller than that which would attach if it were drawn in the form sanctioned or when it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect (*In re Barber, Ex parte Stanford* (1886); *Brandon Hill, Ltd. v. Lane* (1915)). The case of *Saunders v. White* (1902) provides an example of a divergence which rendered a bill of sale void: Two persons jointly and severally assigned goods by bill of sale to secure repayment of an advance. None of the goods belonged to the parties

jointly, but some belonged to one and some to another, and the schedule to the bill did not specify to which grantor the goods respectively belonged. The bill was held void as not in accordance with the form provided in the Act.

The following is the form of conditional bill of sale given in the Schedule to the Act of 1882—

This Indenture made the day of , between A. B. of of the one part, and C. D. of of the other part, witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [Or whatever else the consideration may be], he the said A. B. doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent per annum [Or whatever else may be the rate]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of

[Or whatever else may be the stipulated times or time of payment] And the said A. B. doth also agree with the said C. D. that he will

[Here insert terms as to insurance, payment of rent or otherwise, which the parties may agree to for the maintenance or defeasance of the security]

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, etc.,

Signed and sealed by the said A. B. in the presence of me E. F. [Add witness's name, address, and description]

Attestation

(2) It must be attested by one or more credible witness or witnesses, not being parties thereto. It is not necessary that a conditional bill should be attested by a solicitor as an absolute bill must. The need of an accurate description of an attesting witness, who has no

occupation, is well shown by the case of *Sims v. Trollope* (1897).

(3) The bill must be registered within seven days of its execution, and re-registration is necessary every five years. If the grantor resides outside London, or the goods included in the bill are not within the district of London, the registrar must, within three clear days after the registration, transmit an abstract of the bill of sale in a prescribed form to the registrar of the local County Court where it will be filed. Registration not only gives publicity to the fact of the granting of a bill of sale, but also secures priority to the grantee over other bills of sale given at a subsequent date. As the grantor has the equity of redemption he can always grant a second or other bill of sale in the same manner as a mortgagor can grant a second or other mortgage. The rights under a bill of sale may be transferred, but there is no need for the transfer to be registered. Registration

(4) The consideration for which the bill of sale is given must be truly set out, and must amount to £30 at least. Consideration

It will be noticed that the form given in the Act is that of a deed. It contains the names and descriptions of the parties, the consideration for which the bill is given, the assignment by the borrower of the goods, specified in an annexed schedule, to the lender, the interest to be paid, the covenant of the borrower to repay the sum lent together with the interest on a certain day, generally six months after the date of the bill of sale, and a provision that the goods shall not be liable to seizure except for any of the causes specified in the seventh section of the Act. No goods will be included in the security which are not set out in the schedule, which must be annexed to the bill of sale, and if goods are included which are not the property of the grantor, the bill will be void to that extent, except as against the grantor himself. This is a provision which prevents a trader from including in such a bill his stock-in-trade for the time being. A good example of the strictness with which this provision is enforced is Contents of schedule

provided by the case of *Gordon v. Goldstein* (1924). In a bill of sale a husband and wife were together called "the grantor," and purported to assign to the grantee chattels described in the schedule which in fact belonged to the wife alone. The court held that the "grantor" was not the true owner at the time the bill was executed, and that therefore the bill was void except as against the grantor. Future or after-acquired goods and chattels cannot be included in a bill of sale (*Thomas v. Kelly* (1888), though future book debts may be (*Tailby v. Official Receiver* (1888)).

Secured
creditor

Remedies of the Grantee. The grantee of a conditional bill of sale, which is regular in form and not wanting in any of its legal requisites, is a secured creditor, and his claim is superior to the claims of all other creditors of the grantor, except the landlord and the Crown. The landlord has the right of distress for rent accrued due, and can seize and sell in satisfaction of the same any goods which are in or upon the demised premises at the time of making the distress, even though they are comprised in the schedule annexed to a bill of sale given by the tenant. It is therefore necessary for the grantee to be protected against such a contingency. In order to protect him further and save him from the trouble of litigation the Act of 1882, by its seventh section, has set forth the causes for which the goods covered by a bill of sale may be seized. They are—

Ground for
seizing goods
covered by
bill of sale

Default in
payment

(a) If the grantor makes default in payment of any money secured at the time provided for payment (*In re Wood* (1894)), or in the performance of any of the covenants contained in the bill, which are necessary for maintaining the security (*Bianchi v. Offord* (1886); *Furber v. Cobb* (1887)).

Bankruptcy

(b) If the grantor becomes bankrupt or suffers his goods to be distrained for rent, rates, or taxes.

Fraudulent
removal of
goods

(c) If the grantor fraudulently removes his goods or suffers them to be removed from the premises where they are at the date of the execution of the bill (*Furber v. Cobb* (1887)).

(d) If the grantor refuses, without reasonable cause, upon demand in writing by the grantee to produce his last receipts for rent, rates, and taxes (*Ex parte Cotton* (1883); *Davis v. Burton* (1883); *Ex parte Wickens* (1898)).

Refusal to produce last receipts for rent, rates, and taxes

(e) If the grantor allows execution to be levied against his goods by any judgment of law.

Execution

After seizure the grantee may sell the goods seized in the same manner that a mortgagee can sell the land mortgaged when the power of sale has arisen.

If the grantor of a bill of sale sells the goods that are subject to the bill he is liable to an action for conversion. Similarly, anyone who retains the goods after request by the grantee of the bill is guilty of conversion (**Cooper v. Willomatt** (1845)).

Conversion

Remedy of the Grantor. If the grantor has any ground upon which to impugn the transaction, either that the bill of sale is void or that the seizure is irregular, he may apply to a judge of the High Court to restrain the grantee from removing or from selling the goods. The application must be made within five days of the seizure of the goods, and during that period the goods must not be moved. If the judge is satisfied that the grantor has *prima facie* a just cause of complaint, and that by payment of money or otherwise the cause of seizure no longer exists, he may restrain the grantee from removing or from selling the goods comprised in the bill of sale, or make such other order as he thinks just.

Application to High Court

Publicity. Every bill of sale, in order that it may be valid, must, as has been stated, be registered and re-registered if it remains in existence for five years. Any person is entitled to search the register and to obtain an official copy of any bill of sale. When a bill of sale is satisfied, the satisfaction will be entered up, and this will be as extensively advertised as the bill of sale was upon registration.

Registration

CHAPTER XX

PAWNS AND PLEDGES

Definition of pledge

A PLEDGE, or as it is often called, a pawn, is a delivery of the possession of goods, or of documents of title to goods, by one person, called the transferor, pawner, or pledgor, to another, called the transferee, pawnee, or pledgee, as a security for the payment of a debt or for the performance of a specified engagement. Its effect is to transfer along with the possession all consequent rights, and therefore a pledgee can maintain an action for the return of the goods, if they are taken from him, as well as the pledgor. The general property, in fact, remains with the pledgor, but a special property passes to the pledgee.

Requisites for valid pledge

There is no need of writing or other formality to complete the security effected by a pledge. Pledges are outside the Bills of Sale Acts altogether (*Hilton v. Tucker* (1888)). The person who pledges goods must have the property therein, unless a particular power is given to him, e.g. a factor. (See the Factors Act, 1889, page 124, *ante*.)

Retention of possession and sale

Rights of Pledgee. The pledgee has the right to retain possession of the goods until the debt is paid, and if it is not paid on the date fixed, or after reasonable notice requiring payment when no date is fixed, he may sell the goods pledged, deduct the amount of his debt together with interest and costs, and return the balance, if any, to the pledgor. If the sale of the goods does not produce a sum sufficient to satisfy the debt, interest, and expenses, the pledgee has a personal claim against the pledgor for the balance.

No right of foreclosure

Since the property or ownership in the goods does not pass to the pledgee, there is no right of foreclosure such as is incidental to a mortgage.

Loss of rights

The pledgee loses his rights if he parts with the possession of the goods pledged. But if the pledgor regains them for a special purpose, with the permission of the

pledgee, this is not so (*North Western Bank v. Poynter* (1895)), the pledgee can reclaim the goods. If, however, the pledgor, having regained possession of the goods, fraudulently or otherwise, parts with them to a third person, *bona fide* and for a good consideration, the pledgee has no right of action against such third person (*Babcock v. Lawson* (1880)).

Duty of Pledgee. The pledgee must use ordinary diligence in his care of the pledge (*Coggs v. Bernard* (1704)), but if it is lost, in spite of such diligence, he incurs no liability.

Use ordinary diligence

Again, if the pledge is stolen, it is sufficient for the pledgee to show, in order to free himself from all liability, that he has acted with as much care as an ordinarily prudent man would show in doing all he could to insure safety. If the loss results from a robbery the pledgee is entirely exonerated. A pledge does not carry with it a right of use unless such use is necessary for its preservation or would be otherwise beneficial. Thus, if an animal were pledged, a certain amount of use might be not only not harmful but actually beneficial. But as a general rule the pledgee who uses a pledge does so at his peril.

Theft of pledge

Duty to use pledge in certain circumstances

There is an implied undertaking on the part of the pledgee to return the goods pledged when the debt is paid, unless they have been already sold under the above-mentioned right of sale (*Chccsman v. Exall* (1851)).

Duty to return goods pledged

Pawnbrokers. These are persons duly licensed to carry on the business of taking goods and chattels in pawn. The business of pawnbrokers is regulated by the Pawnbrokers Act, 1872 (35 & 36 Vict., c. 93), of which the principal provisions are the following—

- (1) The Act does not apply to loans of more than £10.
- (2) The pledge must be authenticated by a pawn-ticket.

(3) Every pledge may be redeemed at any time before sale except that where the amount lent is not more than ten shillings the pledge becomes the absolute property of the pawnbroker after twelve months and seven days.

(4) If the loan exceeds ten shillings the pledge must be sold by auction. Any balance, after the expenses of the sale, the loan, and the interest have been paid, belongs to the pledgor, who is, in turn, liable to be sued for any deficiency.

(5) Special contracts may be entered into when the amount of the loan exceeds forty shillings, and must be authenticated by special pawn-tickets signed in duplicate.

Duty to insure

As a pawnbroker is liable for loss by fire, it is his duty to protect himself by insurance.

Liability for conversion or detainue

If a pawnbroker takes in pledge stolen goods, or goods which are not the property of the pledgor, he is liable to be sued for conversion or detainue, and may be compelled to restore the goods to the rightful owner. He is not then entitled under ordinary circumstances to any compensation for the loss which he sustains. On the sale of a pledge there is no warranty of title on the part of the pawnbroker. The buyer has only the rights in the pledge transferred to him which the pawnbroker himself had. If, therefore, for example, an article is stolen and pledged with a pawnbroker, and the pawnbroker sells it under his statutory right, the real owner can demand restitution of the article from the buyer, and the buyer has no remedy, in the absence of any express warranty or of fraud, against the pawnbroker (*Morley v. Attenborough* (1849)).

No warranty of title

Lost pawn ticket

The holder of the pawn-ticket is presumed to be the owner of the pledge, and is entitled *prima facie* to demand its production. If the real owner loses the ticket he must apply to a magistrate for relief, and the pawnbroker may be compelled to give him another ticket if he demands it within three days of his application to the magistrate. The pawnbroker cannot then deliver up the pledge to the holder of the original ticket (*Burslem v. Attenborough* (1873)).

CHAPTER XXI

LIEN

THE term "lien" has more than one meaning. Only one of these falls within the scope of the present chapter, and only one other, maritime lien, is dealt with in this volume (see page 503, *post*).

Lien signifies the right of a person who has possession of the goods of another to retain such possession until a debt due to him has been discharged. This right is sometimes called a "possessory lien."

Requisites to Establish a Lien. No lien can arise unless the goods, over which the lien is claimed, have come lawfully into the possession of the person who claims the lien in the ordinary course of business (*Sunbold v. Alford* (1838)). The lien is generally lost if the possession of the goods is abandoned, but this does not include their deposit with a bailee for safe custody, nor an involuntary loss of the goods. When the lien has once been lost by a voluntary abandonment of possession, it is not revived by possession being regained except in a few special cases. For example, an insurance broker who effects a policy loses his lien upon it if he voluntarily allows it to go out of his possession, but directly he regains the policy the lien revives. Also an inn-keeper who has a lien upon a horse may lend it to the owner for exercise without losing his lien. And an unpaid seller of goods may retake possession and set up his lien by exercising the right of stoppage *in transitu*.

Particular Lien. Possessory liens are divided into two classes, particular and general. A particular lien is a right which arises in connection with the goods as to which the debt arose. The most common instances are those of a carrier, who can retain the goods delivered to him for carriage until his charges are paid, a tradesman or labourer, who is not bound to give up goods upon

Definition of
lien

Maritime lien

Possessory
lien

Lawful
possession

Insurance
brokers

Inn-keepers

Unpaid seller
of goods

Examples of
particular lien

which he has expended labour unless he is rewarded for the same, and a warehousemen, who is entitled to recompense for the trouble to which he has been put. See *Cowell v. Simpson* (1809); *Scarfe v. Morgan* (1838); *Forth v. Simpson* (1849); *Keece v. Thomas* (1905); *Green v. All Motors Ltd.* (1917). The facts of this last-mentioned case have been set out fully on page 247. But in addition to these liens, which are implied by law, the owner of goods and the possessor may create a particular lien over the goods by express agreement between themselves.

Examples of
general lien

General Lien. A general lien, which arises from custom or contract, is a right to detain goods not only for debts incurred in connection with them, but also for a general balance of account between the owner and the possessor. The most common instances of general lien are of those factors (*Houghton v. Matthews* (1803); *Stevens v. Biller* (1883)); bankers (*London Chartered Bank of Australia v. White* (1879)); auctioneers (*Webb v. Smith* (1885)); stockbrokers (*In re London & Globe Finance Corporation* (1902)); wharfingers (*Moët v. Pickering* (1878)), and, in some instances, insurance brokers (*Fisher v. Smith* (1879)).

Solicitor's Lien. The general lien of a solicitor is of sufficient importance to be considered more fully. For his professional charges a solicitor is entitled to retain all papers of his client which come into his possession, and he has, moreover, a lien on all moneys recovered in an action. But he cannot refuse to produce any of the papers if they are required in any particular action. In such a case the solicitor is served with a *subpoena duces tecum*, and the fact that the solicitor's costs are unpaid is no answer to such a subpoena (*Boughton v. Boughton* (1883)). For other cases on a solicitor's lien reference should be made to *In re Wadsworth* (1886); *Boden v. Hensby* (1892); and *In re Knight* (1892). The general result of the cases just noted seems to be that where there are several solicitors in succession employed in an action, and where the litigation is in respect of or affects a sum of money which is in court, and this sum

is not sufficient to meet the whole of the costs incurred by the solicitors, that solicitor who carries through the action to its conclusion is the one who is entitled to a first claim upon the money in court. As to the other solicitors, the claim of each comes in inversely to the order of his employment, and so it comes to pass that the solicitor who was first employed is the last to come in for consideration or to have any lien. This rule is not affected in any way by the fact that any of the solicitors have obtained a charging order with respect to their costs.

Rights Conferred by Possessing a Lien. A possessory lien, to whichever class it belongs, does not give the possessor any right to deal with the goods except such as belongs to the possessor merely. Thus, he has not a right of sale (*Thames Iron Works & Shipbuilding Co. v. Patent Derrick Co.* (1860)), except in so far as a statutory authority has been conferred upon him, e.g. in the cases of an innkeeper (Innkeepers Act, 1878 (41 & 42 Vict., c. 38)), or of a wharfinger (Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60)). The parties themselves, however, may agree that there shall be such a right, and this agreement will override the general rule of law.

Right of
possession
only

Loss of Lien. In addition to loss of lien by parting with the possession of the goods over which the lien exists, a lien is lost or extinguished if the possessor agrees to give credit for the amount due, or if he agrees to accept some other security for the debt owing to him. But the whole of the facts of each case must be considered, in order to see whether the actual taking of the security is inconsistent with the existence of the lien or destructive of it (*Ex parte Willoughby* (1881); *Angus v. McLachlan* (1883)).

PART V

INSOLVENCY

CHAPTER XXII

BANKRUPTCY AND BANKRUPTCY PRACTICE

**Basis of law
of bankruptcy**

THE modern law of bankruptcy is based upon the principle that if a person becomes hopelessly involved in difficulties, and is unlikely to be able to meet his obligations at any time, some effort should be made to extricate him from that position. This is accomplished by dividing the debtor's property equitably among his creditors, and releasing him, under certain conditions, from all future liability as to his past debts and obligations.

**Bankruptcy
Acts**

The first English statute on bankruptcy was passed in the reign of Henry VIII, and was directed against fraudulent debtors. From time to time other statutes were passed to alter and amend the law. Until 1861 the advantages afforded by bankruptcy could not be claimed by persons who were not traders. A great change was made by the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), which, with various amending Acts, constituted the statutory provisions relating to bankruptcy until the passing of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59). This Act professes to be one passed to consolidate the law relating to bankruptcy; but it must be borne in mind that some of the provisions of the former Acts are still in force, and certain of these are of great importance. Further, the Act of 1914 has been amended by the Bankruptcy (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 7).

High Court

Jurisdiction in Bankruptcy. The courts which administer the law of bankruptcy are the High Court for bankruptcies within the metropolitan district, and the various County Courts, if they have had jurisdiction conferred upon them, for bankruptcies within the area

County Court

of their divisions. A special judge is appointed for the bankruptcy work in London, and he is assisted by officials who are called registrars in bankruptcy. The Board of Trade is entrusted with very large controlling powers in connection with bankruptcy proceedings.

In considering the district where proceedings in bankruptcy should be commenced, the residence or the place of business of the debtor is a most important factor. If he has resided or carried on business within the metropolitan area for a longer period than anywhere else, during the six months preceding the commencement of proceedings, or if he is resident abroad, or if his place of residence is unknown, the High Court is the proper place in which to present the petition. Otherwise the County Court of the district in which he has resided or carried on business for the longest period during the said six months must be selected.

Who may be made Bankrupt? As a general rule any person who has the capacity to contract may be made bankrupt. Contractual capacity

It is doubtful whether an infant can be made bankrupt at all (*Ex parte Jones* (1881)); and if so the bankruptcy would have to be founded on a debt contracted for necessities, or upon a judgment arising out of an action in tort. If an infant is a member of a partnership firm which is made bankrupt the infant will be excluded from the proceedings in bankruptcy (*Lovell & Christmas v. Beauchamp* (1894)). A receiving order will be made against the firm "other than" the infant partner (*In re A. & M.* (1926)). But the whole of the partnership assets will be available for the partnership debts. The infant's separate estate, however, will not be touched. It was at one time held that an infant could not even present a bankruptcy petition against another person. This is no longer the case, but it is conceived that a debtor might require some adult to be joined so as to give security for costs if the debtor succeeds in resisting the petition and putting an end to the bankruptcy proceedings (*Ex parte Brocklebank* (1877)). Infant

A married woman is subject to the bankruptcy laws, Married woman

if she carries on a trade or business, whether separately from her husband or not, as though she was a feme sole; and the court may in such a case even attach the whole or a part of her private income, in spite of any "restraint on anticipation." Moreover, a final judgment obtained against her, even when in the form settled in the case of *Scott v. Morley* (1887), is available as a ground upon which to issue a bankruptcy notice against her (sect. 125 of 1914 Act). But unless a married woman is engaged in trade, she cannot be made a bankrupt. And although, since the Married Women's Property Act, 1882, a woman can contract with her husband just the same as with any other person, in bankruptcy he cannot, if he is a creditor, compete for a dividend with other creditors for value. A married woman is under a similar disability in the case of the bankruptcy of her husband. As to the trading of a married woman, see *In re Allen* (1915); *In re Reynolds* (1915).

Must be
engaged in
trade

A person of unsound mind can be made bankrupt if the act upon which the petition is founded was committed during a lucid interval, or if his committee (that is, the person who has charge of the estate), or the court consents to such a course being taken. In any case, the sanction of the Court in Lunacy should be obtained.

Person of
unsound
mind

A convict may be adjudicated a bankrupt, even after conviction (*Ex parte Graves* (1881)).

Convict

Aliens are subject to the bankruptcy laws as well as British subjects.

Alien

An alien can be made bankrupt if at the time of the act of bankruptcy he ordinarily resided or had a place of residence or was carrying on business by himself or his agent, or was a member of a firm carrying on business in England. It may be noticed that an alien is perfectly entitled to be a petitioning creditor.

Company,
corporation,
or firm

A corporation, partnership, association, or company registered under the Companies Act cannot be made bankrupt; it must be wound up. A limited partnership may be made bankrupt, and if the general partners are made bankrupt the assets of the limited partnership vest in the trustees. If a receiving order is made

against a firm it operates as a receiving order against each person who is a partner, but each partner must be adjudicated bankrupt individually.

Although a dead man cannot be made bankrupt, his estate may be administered in bankruptcy. Deceased's estate

Acts of Bankruptcy. In order that proceedings in bankruptcy may be taken against a person, it is necessary that a petition should be presented to the proper court, either by the debtor himself or by a creditor, and that a receiving order should be made. This cannot be done unless there has been what is called an act of bankruptcy. The term is not at all appropriate. The so-called act of bankruptcy is really an act upon which a bankruptcy petition may be founded. The various acts of bankruptcy are set out in sect. 1 of the Bankruptcy Act, 1914. A debtor is said to commit an act of bankruptcy in each of the following cases—

(1) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. Assignment for benefit of creditors generally

It must be carefully noted that the assignment must be made of the whole of the debtor's property to a trustee or trustees for the benefit of his creditors generally. An assignment to one or more particular creditors, or to a trustee or trustees for the benefit of a particular creditor or of a number of creditors is not in itself an act of bankruptcy (**In re Phillips** (1900)).

(2) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof. Fraudulent transfers

(3) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would, under any Act, be void as a fraudulent preference if he were adjudged bankrupt.

It is the fraud implied in this case, as it is in case number (2) above, which makes it contrary to law. If it were not so, a person with many creditors, seeing that insolvency was impending, might easily defeat the aim of an equitable division of his property by preferring

one or more creditors and leaving the rest totally unprovided for. A fraudulent preference of this kind made any time within three months before the presentation of the bankruptcy petition is liable to be set aside. Conveyances of property made for valuable consideration are unaffected by the Act, and a *bona fide* voluntary conveyance or gift, although it may be set aside, will not furnish ground for the presentation of a petition.

Going abroad

(4) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.

This refers to the actions of a debtor in using any method to keep out of the way of his creditors. There must be an "intent to defeat or delay," and this must be proved as a matter of fact. A few examples may be given. When a debtor knows that the necessary consequence of his going abroad will be to defeat or to delay certain creditors, he will be held to have acted with the intention of defeating or of delaying them (*In re Finney* (1874)). Where a domiciled Englishman had his permanent home in France, it was held that no intent to defeat or to delay his creditors was to be inferred from the fact that he remained in France, nor from a statement which he made, when on a short visit to England, that he thought he should be more able to provide for the claims of his creditors in England by remaining abroad than if he returned to this country (*In re Trench* (1884)). Absenting himself from his dwelling-house or his place of business will not necessarily constitute an act of bankruptcy on the part of the debtor if he leaves a representative to attend to his affairs (*In re Woolstenholme* (1887); *In re McKeand* (1889)). But a married woman who, whilst carrying on a business separately from her husband, leaves her place of business without paying her creditors or notifying her change of address, commits an act of bankruptcy, even though she goes away at her husband's request in order to live with him

elsewhere (*In re Worsley* (1901)). A debtor begins to "keep house" if he withdraws to a part of his dwelling more retired than that in which he usually sits (*Key v. Shaw* (1832)), though he is perfectly justified in denying himself to his creditors at unreasonable hours (*Smith v. Currie* (1813)); and it is still an act of bankruptcy if the retirement has been made to avoid the service of a writ, with the object of gaining time, and so obtaining an accommodation from friends with which to pay off his creditors (*Richardson v. Pratt* (1885)).

(5) If execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

Execution
unproductive

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, is not to be taken into account in calculating such period of twenty-one days.

"Execution" is the most usual method of enforcing a judgment debt when the debtor has failed to pay what is owing upon the judgment. If the execution is unproductive, and in the meantime the debtor neither pays the debt nor compounds for it, a bankruptcy notice, in the prescribed form, may be served upon him, and unless he does one of the things set out therein, he commits an act of bankruptcy upon which a petition may be presented.

It may here be usefully noticed that even when an execution has been levied and the execution has not turned out unsuccessfully, the execution creditor may yet be deprived of the fruits of his diligence. There must not only be an execution levied, but it must be completed by the seizure and sale of the goods of the debtor, or by the seizure and the appointment of a receiver over the lands of the debtor, or by the receipt of the amount of the debt owing before the date of the

receiving order, or before it has been notified to the creditor that an act of bankruptcy has been committed within three months of the presentation of a petition against the debtor. But this is not all. The sheriff must retain the amount of the levy, if it exceeds £20, after deducting his expenses, for fourteen days after the sale is complete. Then he can safely hand over the sum he has in hand to the creditor. But if he receives a notification of a bankruptcy petition the money is paid to the Official Receiver and not to the creditor. This does not affect a purchaser of goods at the sale by order of the sheriff. The purchaser, who acts in good faith, has a perfect title to the goods which he has bought.

Declaration of
inability to
pay debts

(6) If he files in the court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.

Bankruptcy
notice

(7) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained.

Any person who is for the time being entitled to enforce a final judgment is deemed to be a creditor who has obtained a final judgment or final order.

Form of
notice

A bankruptcy notice must be in the prescribed form, and must require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or of the court.

The notice must further state the consequences of non-compliance with it (Bankruptcy Act, 1914, sect. 2).

(8) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Suspension of
payment of
debts

The notice need not be set out in writing. All that is required is some statement by the debtor from which any reasonable person might infer that it was his intention to suspend payment (**Crook v. Morley** (1891); *In re Scott* (1896)). In *In re Miller* (1901), a debtor was "hammered" on the Stock Exchange, and a few days afterwards, in the course of conversation, he told a creditor that he was utterly penniless, that he could not pay anybody, and that he had lost everything. This was held to be a sufficient notice of having suspended the payment of his debts. But where the debtor, an outside broker, informed each of his Stock Exchange clients that he would have a difficulty in meeting his engagements on pay day and gave them permission to close his account earlier than customary, but made no reference to any of his other creditors, it was held that this was not an act of bankruptcy by suspending payment (*In re Reis* (1904)).

The Petition. Proceedings in bankruptcy are commenced by the presentation of a petition asking that a receiving order may be made against the debtor. A debtor may also petition to have such an order made against himself. In addition, it is provided by sect. 107 subsect. (3) of the Bankruptcy Act, 1914, that "where, under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a court having bankruptcy jurisdiction, for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

Receiving
order in lieu
of committal
under Debtors
Act

In order that a creditor may petition the following conditions must be fulfilled—

Requisites for
presentation
of petition

(1) The debt due to him (or to two or more creditors if the petition is presented jointly) must amount to £50 at least.

(2) The debt must be an ascertained or liquidated sum, payable immediately or at a future certain date. It must be liquidated at the time of the act of bankruptcy; the fact that it becomes liquidated subsequently is insufficient (*In re Debtors* (1926)).

(3) The act of bankruptcy relied upon must have been committed within three months previous to the presentation of the petition.

(4) The debtor must be a person who is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland, or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is (or within the said period has been) a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or as agent or manager.

Where deed
of arrange-
ment executed

Where a deed of arrangement has been executed, a creditor is not entitled to present a bankruptcy petition founded on the execution of the deed, or on any other act committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed, in the cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement.

Secured
creditor

If the petitioning creditor is secured, he must, in the petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or he must give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after

deducting the value as estimated, in the same manner as if he were an unsecured creditor.

For the purpose of assisting him at the hearing of his petition, a creditor is entitled to the production of the debtor's books to prove the allegations set out in the petition. And it appears that the debtor himself may be called by the petitioning creditor as a witness in support of the petition on the ground that, since the debtor can himself petition for an adjudication of bankruptcy, proceedings in bankruptcy are no longer of a quasi-criminal nature (*In re X. Y.* (1902)).

Production of
debtor's books

Debtor as
witness

When the petition is presented by a creditor, an affidavit must be filed verifying the facts contained in the petition, a copy of the petition must be served on the debtor, and then the petition will be heard after an interval of not less than eight days from the date of the service. On the hearing of the petition the court will make a receiving order or dismiss the petition as it thinks fit.

Procedure on
presentation
of petition

If the debtor himself is the petitioner, the court will generally make a receiving order at once. The debtor must, in his petition, allege his inability to pay his debts. But it does not follow as a matter of course that a receiving order will be made against him. In the case of *In re Betts* (1901), it appeared that the debtor, with the intention of evading committal orders made against him upon judgment summonses, presented a bankruptcy petition against himself, upon which a receiving order was made. He had previously at short intervals and with the same object presented two other bankruptcy petitions upon which receiving orders had been made, and was an undischarged bankrupt under three bankruptcies. It was held that the presentation of the petition by the debtor under such circumstances was an abuse of the process of the court, and that no receiving order ought to be made. A comparison should be made between this case and *In re Hancock* (1904) and *In re Archer* (1904).

Debtor's
petition

If a creditor presents the petition he must pay the stamp duty of £6 and make the deposit required by

Creditor's
petition

the bankruptcy rules ; the fee on a debtor's petition is £5. The petitioner is likewise liable to pay all the costs of the proceedings up to the time of and including the making of the receiving order.

Petition can-
not be with-
drawn

No petition having once been presented, either by a creditor or by the debtor, can be withdrawn except by leave of the court. If two or more petitions are presented by several creditors, some of these may be dismissed, and the remaining ones consolidated, or the conduct of the bankruptcy left in the hands of one particular creditor. A new petitioner may be substituted for the original petitioner if the latter does not duly proceed with the matter.

The Receiving Order. When the court is satisfied with the proof of the facts alleged in the petition, if the petition is presented by a creditor, and the debtor can urge no valid reason why the petition should be dismissed, it will make a receiving order against him. This order is served upon the debtor and advertised in the *Gazette*.

Effect of
order

The effect of the order is to make the Official Receiver, who is a public officer appointed by the Board of Trade, the receiver of the property of the debtor. It deprives the creditors of all remedies, except in the bankruptcy, against the property or the person of the debtor, unless they are secured creditors, or their debts are not provable in bankruptcy. The peculiar position of a landlord to whom any rent is due will be noticed later. The court has, moreover, power to stay all proceedings against the debtor in any action which may be pending at the date of the petition. This does not, however, prevent a secured creditor from realising or otherwise dealing with his security in the same manner as he would have been entitled to do if no bankruptcy proceedings had been taken. (See page 433, *post*.)

After the making of a receiving order, the court may, from time to time for any period not exceeding three months, order that the letters of the debtor shall be re-directed and delivered through the Post Office to the Official Receiver, or to the trustee of the debtor's estate,

or otherwise as the court itself may direct. An application to this effect cannot be made except by the Official Receiver or the trustee in bankruptcy.

Registration of Petitions and Receiving Orders Affecting Land. In order that they shall be binding on the purchaser of a legal estate in good faith for money or money's worth without notice of an available act of bankruptcy, both a bankruptcy petition and a receiving order must be registered. The petition is registered in the register of pending actions, and the receiving order in the register of writs and orders. The registration ceases to have effect at the expiration of five years from the date of the registration, but it may be renewed (Land Charges Act, 1925 (15 Geo. 5, c. 22), sects. 2, 3, 6 and 7). A petition in bankruptcy, filed after 1st January, 1926, which is not registered as a pending action, is not notice or evidence of any act of bankruptcy therein alleged.

Under the
Land Charges
Act

By sect. 23 of the Land Charges Act, 1925, it is provided that the provisions with regard to the registration of pending actions and orders do not apply in the case of registered land. By sect. 61 of the Land Registration Act, 1925, however, the registrar must as soon as practicable after the registration of a petition in bankruptcy or of a receiving order in bankruptcy under the Land Charges Act, enter in the former case a creditor's notice and in the latter a bankruptcy inhibition against the title of any proprietor of any registered land or charge which appears to be affected.

Registered
land

Statement of Affairs. After a receiving order has been made against a debtor, a statement of his affairs must be made by the debtor and submitted to the Official Receiver. This must be done in the prescribed form, must be verified by affidavit, and must show the particulars of the debtor's assets, debts, and liabilities, the names, residences, and occupations of his creditors, the securities held by them respectively, the dates when such securities were given, and such further or other information as the Official Receiver may require.

Form of
statement

Time for
submission of
statement

If the receiving order is made upon the petition of the debtor the statement must be submitted within three days from the date of the order. If a creditor is the petitioner seven days are allowed within which to prepare the statement. But if there are special circumstances the court may extend the time in either case.

Failure to
provide
statement

Unless the debtor complies with these requirements, the court will, in the absence of a satisfactory explanation, adjudge him bankrupt upon the application either of the Official Receiver or of any creditor. For the purpose of making the statement as clear and full as possible, the Official Receiver may require and compel the personal attendance of the debtor.

Personal
attendance of
debtor

Inspection of
statement

The statement of affairs may be inspected by any person who states in writing that he is a creditor of the debtor's estate, and a copy thereof or extracts therefrom may be taken. A creditor need not do any of these things personally—he may depute an agent to do them for him. But if a person falsely asserts that he is a creditor and attends to inspect, make a copy, or take extracts from the statement of affairs he is guilty of a contempt of court, and is liable to be punished accordingly upon the application of the Official Receiver or the trustee.

Procedure at
meetings

Meetings of Creditors. The making of a receiving order must be carefully distinguished from an adjudication of bankruptcy. Whether this course is or is not to be adopted will be decided at one of the meetings of the creditors. In many cases there is but one meeting, and this, the first of a series if there are several, must be held, as a rule, within fourteen days after the date of the receiving order. The Official Receiver, or his nominee, acts as chairman at the first meeting. At any subsequent meeting the creditors choose their own chairman. A quorum is constituted if three creditors are present at the meeting, but if the total number of creditors does not exceed three, the presence of the whole of the creditors is necessary in order that the meeting may have power to deal with the matters which are ordinarily submitted to the creditors.

Three days' notice, at least, must be given of any meeting subsequent to the first meeting of creditors.

Notice of meetings

No person is entitled to vote at the first or any subsequent meeting of creditors unless he has duly proved his debt, and the proof has been duly lodged not earlier than twelve o'clock at noon of the day but one before, nor later than twelve o'clock at noon of the day before the day appointed for such meeting. Also no creditor is entitled to vote at any meeting in respect of an unliquidated or contingent debt, or of any debt the value of which is not ascertained. If a secured creditor wishes to vote on the proceedings, he must, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and then he is entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he is considered to have surrendered his security unless the court on application is satisfied that the omission to value his security has arisen from inadvertence.

Power to vote

The principal matter for consideration at the first or any subsequent meeting of creditors will be the statement of affairs presented by the debtor, a summary of which, together with any observations upon it made by the Official Receiver, will have been supplied previously to each of the creditors. The debtor must be present, unless due cause is shown to the contrary, at the first meeting at least.

Matters for consideration

The creditors who are entitled to take part in the proceedings, as has been already stated, are those who have proved their debts, that is, satisfied the Official Receiver that they have a *bona fide* legal claim against the estate of the debtor. They may take part either personally or by proxy. Upon this vote by proxy it may be useful to quote paragraphs 16-20 of the first schedule of the Act of 1914—

Voting by proxy

"(16) Every instrument of proxy shall be in the prescribed form, and shall be issued by the Official Receiver of the debtor's estate, or by some other Official

Form of proxy

Receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy, or of any manager or clerk, or other person in his regular employment, or of any commissioner to administer oaths in the Supreme Court.

“(17) General and special forms of proxy shall be sent to the creditors, together with a notice summoning a meeting of creditors, and neither the name nor the description of the Official Receiver, or of any other person, shall be printed or inserted in the body of any instrument of proxy before it is so sent.

General proxy

“(18) A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case, the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

Special proxy

“(19) A creditor may give a special proxy to any person to vote at any specified meeting or adjournment thereof on all or any of the following matters—

“(a) For or against any specific proposal for a composition or scheme of arrangement ;

“(b) For or against the appointment of any specified person as trustee at a specified rate of remuneration, or as member of a committee of inspection, or for or against the continuance in office of any specified person as trustee or member of a committee of inspection ;

“(c) On all questions relating to any matter, other than those above referred to, arising at any specified meeting or adjournment thereof.

Necessity for deposit of proxy

“(20) A proxy shall not be used unless it is deposited with the Official Receiver or trustee before the meeting at which it is to be used.”

A creditor may appoint the Official Receiver of the debtor's estate to act in the manner prescribed as his general or special proxy.

Courses open to creditors

Three courses are open to the creditors at the first or any other of their meetings

(1) They may agree to accept a composition in satisfaction of their debts. This is a course which is always advisable when there is nothing suspicious in the conduct of the debtor, as it saves the costs of bankruptcy proceedings.

1. Accept composition

(2) They may agree to a scheme of arrangement of the affairs of the debtor. The acceptance or rejection of any such scheme as may be offered by the debtor will depend upon the special circumstances of each case.

2. Agree to scheme of arrangement

(3) They may resolve that the debtor shall be adjudged a bankrupt.

3. Resolve that debtor be adjudged bankrupt

A resolution for the adoption of the first or the second course must be carried by a majority in number and a three-fourths majority in value of the creditors who have proved their debts. A bare majority "in value" is sufficient to carry out the third course. In each case the consent of the court must be obtained, and if the composition or the scheme of arrangement is accepted and approved the receiving order is rescinded.

Rescission of receiving order

In addition to the resolution of the creditors that a debtor shall be adjudged a bankrupt, there are other reasons which will induce the court to pronounce an adjudication, viz.—

Other grounds for adjudication

(a) If the creditors at their meeting pass no resolution.

(b) If the creditors hold no meeting at all.

(c) If the composition or scheme of arrangement falls through.

(d) If the debtor has absconded and failed to give a proper account of his affairs.

Notice of the adjudication of bankruptcy must be duly advertised in the *Gazette*.

Notice of adjudication

Public Examination. This is an ordeal through which every debtor must go, unless the receiving order is rescinded before the time appointed for the examination. The date is fixed by the Official Receiver as soon as possible after the debtor has delivered his statement of affairs. The examination is held in open court, and the evidence is taken on oath. Any question may be put to the debtor by the Official Receiver as to his conduct, his dealings, and his property, and the same privilege

How examination conducted

is granted to any creditor who has proved his debt. The examination may be adjourned, and cannot be declared closed until after the first meeting of the creditors, or the time appointed for it if the creditors do not, in fact, meet at all.

Representa-
tion by
counsel or
solicitor

Barristers and solicitors may be employed by the Official Receiver, the creditors, or the debtor, to take part in the public examination, and the same applies to the trustee in bankruptcy if he has been appointed before the conclusion of the examination.

Answers of
debtor as
evidence

The answers given by the debtor, or so many of them as the court thinks proper, are taken down in writing, and afterwards read over to or by the debtor and signed by him. These answers may afterwards be used in evidence against the debtor, and they are open at all reasonable times for the inspection of any of the creditors.

Duties of
Official
Receiver

The Official Receiver. This is an official appointed by the Board of Trade, and who has power to do certain acts within the district for which he is appointed. The first act in connection with bankruptcy proceedings is to receive the property of the debtor and to retain it until his position is taken by the trustee in bankruptcy. Whenever there is a vacancy in the trusteeship the Official Receiver acts as trustee until a new appointment is made. In the cases of small bankruptcies, that is, where the property of the debtor is not likely to exceed £300 in value, no trustee is appointed, but the Official Receiver acts as trustee all through the bankruptcy, unless the creditors by special resolution resolve that some person other than the Official Receiver shall be appointed trustee.

Receipt of
debtor's
property

Vacancy in
trusteeship

Small bank-
ruptcies

Supervision of
bankruptcy
proceedings

In addition to his preliminary duties as trustee the Official Receiver must retain a general supervision of the bankruptcy proceedings, and must guide the court when the time comes for the debtor to apply for his discharge. He presides at the first meeting of creditors, and he must take part in the public examination of the debtor. Moreover, it is his duty to see that proper accounts are made out (for which purpose he is empowered to demand the attendance and assistance of

Accounts

the debtor), to issue the proper advertisements and notices, and to acquaint the creditors with any proposals of the debtor as to the bankruptcy. He is also the person deputed to prosecute the bankrupt in cases of fraud.

Prosecution
of bankrupt
for fraud

If the debtor is carrying on a business of any kind at the time of the receiving order being made it may be of advantage to the creditors that the business should be continued. It is obvious that the Official Receiver, with so many different affairs in hand, cannot himself act in any such business, and power is therefore given to him to appoint a manager for the purpose. The manager so appointed must be approved, so far as giving security is concerned, by the Board of Trade, and his remuneration will be fixed by the creditors, or, in case they do not pass any resolution upon the subject, by the Board of Trade.

Appointment
of manager

The Trustee. The trustee is generally appointed by the creditors, subject to the approval of the Board of Trade. Sometimes the creditors first of all appoint a committee of inspection, consisting of from three to five members, and the selection of the trustee is left in their hands. The appointment, if made by the creditors, is made by ordinary resolution, that is, by a majority in value of those present, voting either in person or by proxy. Of course, no appointment of a trustee is made until the debtor has been adjudicated a bankrupt. The person who is chosen to act as trustee must give security to the satisfaction of the Board of Trade, and then a certificate is issued confirming the appointment. The appointment takes effect from the date of the certificate. If the Board of Trade refuses to grant a certificate to a person chosen by the creditors, the fact of the refusal and the grounds for the same are reported to the High Court, and the court inquires into the validity of the refusal.

Appointment

Confirmation
by Board of
Trade

If a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or in the event of negotiations for a composition or scheme being pending at the expiration of those four weeks, then within seven days from the close of those negotiations

Appointment
by Board of
Trade

by the refusal of the creditors to accept, or the court to approve the composition or scheme, the Official Receiver must report the matter to the Board of Trade, and thereupon the Board of Trade will appoint some fit person to be trustee of the bankrupt's property, and will certify the appointment made by them. If the creditors choose a trustee after the appointment of a person by the Board of Trade, the latter ceases to act and the former takes his place.

Number of trustees

There is no reason why one trustee alone should be appointed, though it is unusual to have more than one. It is not necessary that the trustee should be a creditor of the debtor.

Vesting of property in trustee

As soon as the appointment is confirmed by the issuing of the certificate by the Board of Trade, the whole of the debtor's property passes from the Official Receiver and vests in the trustee. This is by operation of law. No actual transfer is necessary. The fact of the appointment is made known publicly by advertisements in the *Gazette* and in one local paper at least. The cost of the advertisements comes out of the debtor's estate, if there is any; otherwise, the trustee himself must pay the amount.

Duration of appointment

The appointment continues until the trustee resigns, is removed from his office, or himself becomes bankrupt. A resignation cannot be made except at a meeting of the creditors, of which due notice must be given, and a seven days' notice to the Official Receiver. A trustee can be removed by a resolution of the creditors passed at a duly convened meeting. The request for such a meeting must be made by at least one-fourth in value of the creditors, and the motion for removal must be carried by an ordinary resolution. The Board of Trade may also remove a trustee if he is guilty of any misconduct or irregularity in the management of the bankruptcy. This right of removal, however, is subject to an appeal to the High Court. In addition to the above three methods in which a trusteeship may come to an end a trustee ceases to act when the estate has been fully wound up, or when some scheme or arrangement

has been approved by the creditors. His duties are then concluded, and as a trustee he is *functus officio*. The termination of the authority and power of the trustee does not signify that he is quite freed from all liability. He must, in any case, obtain his release, which is only granted by the Board of Trade after a full investigation of all the accounts and a notice to the creditors.

Reference has just been made to the committee of inspection, a small body of from three to five persons. Just as a manager is required to continue the business of a debtor in certain cases, so a number of individuals may be necessary to assist the trustee if the bankruptcy is one of difficulty or complexity. It is for this reason that a committee of inspection is sometimes nominated to assist the trustee, or to supervise his work, or generally to superintend the administration of the bankrupt's estate. The members of the committee are appointed by the creditors from among the body of creditors at their first or any subsequent meeting. The meetings of the committee are arranged by the members themselves. A member ceases to be such if he resigns (having given written notice), becomes bankrupt, is absent from five consecutive meetings, or is removed by an ordinary resolution at any meeting of creditors of which seven days' notice has been given, stating the object of the meeting. It is not essential that there should be a committee of inspection, and if there is not one, any act or thing or any direction or permission authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee.

The principal duties of the trustee are to realise the property of the debtor to the best advantage, and to distribute it, after meeting preferential claims, among the creditors as quickly as possible; to act in conjunction with the committee of inspection, if there is one, and to carry out the resolutions of the creditors and obey the orders of the Board of Trade; and, lastly, to make no personal profit out of the estate beyond the remuneration fixed by the creditors or by the committee of

Powers and duties of the committee of inspection

Duties of trustee

Realisation and distribution of property

Obedience to resolutions of committee of inspection and to orders of Board of Trade

Must not make profit

Accounts

Payment of
moneys into
special
account

Powers of
trustee

inspection. It need scarcely be added that strict accounts of all transactions must be kept, and, for greater security, all moneys realised by the sale or otherwise of the debtor's property must be paid into a special account at the Bank of England. In certain circumstances this last duty may be slightly relaxed.

In order to carry out his duties properly a trustee must obviously be clothed with very considerable powers. It is impossible to enter fully into details in the present volume, nor is it necessary to do so. It is sufficient for the ordinary individual to have a general knowledge of what are the main powers and duties of a trustee in bankruptcy. But it is essential that a man who takes up a trusteeship should have an accurate knowledge of the powers which he possesses under the Bankruptcy Acts, especially as he will render himself liable to costs wasted by improper proceedings being taken or irregular acts being done. A trustee must, therefore, carefully study sects. 76 to 95 of the Bankruptcy Act, 1914, with the assistance of books specially devoted to this branch of the law. He must carefully distinguish between the acts which he can do alone, and those which he can do in conjunction with the committee of inspection.

The trustee has power to do all or any of the following things—

(1) Sell all or any of the bankrupt's property by public auction or private contract.

(2) Give receipts for any money received by him.

(3) Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt.

(4) Exercise any powers vested in him by the Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of the Act.

(5) Deal with any property to which the bankrupt is entitled as tenant in tail in the same manner as the bankrupt might have dealt with it.

With consent
of committee
of inspection

With the permission of the committee of inspection, which must not be a general permission to do all or any

of the acts, but only a permission to do a particular thing in a specified case, a trustee has power to do all or any of the following things—

(1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same.

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt.

(3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection.

(4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit.

(5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts.

(6) Refer any dispute to arbitration, compromise any debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on.

(7) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy.

(8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person.

(9) Divide in its existing form among the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

Further, with the permission of the committee of

inspection the trustee may allow the bankrupt himself to superintend the management of the property or to carry on the trade of the bankrupt for the benefit of his creditors, and in addition he may make an allowance to the bankrupt for the maintenance of himself and his family or for services rendered by him.

Relation back
of title of
trustee

Property Available for Distribution. The title of the trustee dates back to the commencement of the bankruptcy for the purpose of determining what assets are at his disposal. Sect. 37 of the 1914 Act provides that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. This doctrine of "relation back" is important as it enables the trustee to consider all transactions entered into by the bankrupt during the period between the act of bankruptcy and the adjudication.

Commence-
ment of bank-
ruptcy

Property
which is
divisible

The property of the bankrupt which is divisible amongst his creditors comprises (1914 Act, sect. 38)—

All property
vested in
bankrupt at
commence-
ment of bank-
ruptcy

(1) All such property (including money, goods, things in action, land, and every description of property whether real or personal, and whether in England or elsewhere, also obligations, interests, and profits arising out of or incidental to property) that may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and

Exercise of
powers of
bankrupt

(2) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge (except the right of nomination to a vacant ecclesiastical benefice); and

(3) All goods being at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof. (See further, page 423, *post.*)

Reputed ownership

By subsect. (1) of sect. 38 of the Bankruptcy Act, 1914, the following are not comprised in the property which is divisible amongst a bankrupt's creditors—

Property which is not divisible

(1) Property held by the bankrupt on trust.

Trust property

(2) Tools of the bankrupt's trade and the necessary wearing apparel and bedding of himself, his wife and children to a total inclusive value not exceeding £20.

Necessaries

Further, the right of nomination to a vacant ecclesiastical benefice is excluded from the powers of a bankrupt which pass to a trustee.

Power of nomination to ecclesiastical benefice

Of course, if the bankrupt is entitled to any property, income, or anything else upon such terms that it is to pass away from him and go to others in case of bankruptcy, the trustee has no claim upon such property or its income. But when such a case arises the facts will be carefully scrutinised, and the settlement must have been made by a person other than the bankrupt. No man can legally settle property of his own upon himself and add a condition that the property shall pass over to another person in case of his (the settler's) bankruptcy. Such a settlement would be void, and the trustee would be entitled to the property comprised in it.

Interest ceasing on bankruptcy

It is quite clear from sect. 56 that rights of action pass to the trustee in bankruptcy in so far as such rights affect the property of the bankrupt.

Actions arising out of contracts and torts

A difficulty sometimes arises as to rights of action arising out of contracts and torts. It has been asserted that a right of action arising out of a breach of contract passes to the trustee, unless it is of a personal nature, such as a contract to marry. The same is perhaps true as far as a tort is concerned. If both the estate and the person of the bankrupt are affected it is probable that the cause of action may be split, and that the trustee

has a claim so far as the estate is concerned, but the personal part remains with the bankrupt himself (*Rose v. Buckett* (1901)). But if the trustee does not intervene in an action of tort the bankrupt is entitled, and is often the proper person to sue. Thus, in *Bailey v. Thurston* (1903), it was held that an undischarged bankrupt, employed under a contract of service made before the bankruptcy, is entitled to maintain an action against his employers for a wrongful dismissal occurring after the commencement of the bankruptcy. For several obvious reasons it is clear that a trustee in bankruptcy would be rashly hazarding the assets of a bankrupt's estate if he were to take up certain kinds of actions, and endeavour to recover damages for the same, e.g. libel, slander, false imprisonment, malicious prosecution, etc. Not only would there be the risk attendant upon such actions, but the bankrupt himself might, by his own conduct, render success an absolute impossibility.

But although the trustee has a general right to take nearly everything belonging to the bankrupt between the time of the commencement of the bankruptcy and the granting of the discharge, there are certain transactions which are protected.

Protected
transactions

It has already been stated that the title of the trustee relates back to the commencement of the bankruptcy; certain transactions, however, which took place before the receiving order are protected where they are *bona fide*. Any payment by the bankrupt to any of his creditors, any payment or delivery to the bankrupt, any conveyance or assignment by the bankrupt for valuable consideration and any contract, dealing, or transaction by or with the bankrupt for valuable consideration are valid if the transaction takes place before the date of the receiving order, and if the person (other than the debtor) concerned in the transaction had not, at the time the transaction took place, notice of any available act of bankruptcy committed by the bankrupt before that time (sect. 45).

Bona fide
transactions
without
notice

The sale of a business by a person in financial

difficulties to a private company is not protected by this section where the company have notice of the position, because the only transactions protected by the section are *bona fide* transactions. The transfer to a company would at least delay creditors (*In re Simms Ex. parte Quaife* (1930)).

A payment of money or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him, is a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bona fide* (sect. 46).

Validity of
certain pay-
ments to
bankrupt

Sects. 45 and 46 afford protection only in the case of *bona fide* transactions (*In re Simms* (1930)). Further, it should be particularly noticed that they apply only in the case of transactions taking place before the making of the receiving order. The fact that a party acts *bona fide* and without any knowledge of the receiving order does not relieve him from liability in the case of payments after the date of the receiving order (*In re Wigzell* (1921)).

Transactions
after date
of receiving
order but
before notice

To lessen the liability in this respect, however, sect. 4 of the Bankruptcy (Amendment) Act, 1926, provides that where any money or property of a bankrupt has, on or after the date of the receiving order, but before notice has been gazetted, been paid or transferred by a person having possession of it to some other person, and the payment or transfer is void under the 1914 Act, then, if the person by whom the payment or transfer was made proves that when it was made he had not had notice of the receiving order, any right of recovery which the trustee may have against him in respect of the money or property is not to be enforced by legal proceedings except in so far as the court is satisfied that it is not reasonably practical for the trustee to recover the money or property or some part thereof from the person to whom it was paid or transferred.

After-acquired
property

By sect. 47 of the Act of 1914, it is provided, "All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction." By this section, the rule known as the rule in *Cohen v. Mitchell* (1890), is legally established, and its former limitation to personal property has become obsolete. But the transaction must be one for value (*In re Bennett* (1907)). In *Hunt v. Fripp* (1898), the rule was held to apply where the after-acquired property consisted of a legacy and a share of residue under a will, even when the trustee intervened before the bequeathed property reached the hands of a *bona fide* equitable assignee. In the same case it was held that the assignment of the future acquired property was not necessarily *mala fide* because at the time the assignee had knowledge of the assignor's bankruptcy and the trustee in bankruptcy was ignorant of the fact that the bankrupt had acquired the assigned property.

Personal
earnings of
bankrupt

The personal earnings of a bankrupt, so far as they are required for the maintenance of himself, his wife, and his family, are safe from the hands of the trustee (*In re Roberts* (1900)). This principle, though recognised by the court, is not supported by the Act. Any amount over and above what is necessary goes to the trustee. The following are the provisions of sect. 51 of the Act of 1914 relative to this matter—

Officer in
army or navy,
civil servant,
etc

"(1) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the Civil Service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or

salary is enjoyed, may direct. Before making any order under this sub-section, the court shall communicate with the chief officer of the department as to the amount, time, and manner of payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment.

"(2) Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct.

Other persons
in receipt of
salary or
income

"(3) Nothing in this section shall take away or abridge any power of the chief officer of any public department to dismiss a bankrupt, or to declare the pension, half-pay, or compensation of any bankrupt to be forfeited."

Sect. 51 is not excluded by the provisions of the Police Pensions Act, 1921, to the effect that the right to a police pension shall not vest in the trustee in bankruptcy (*In re Garrett* (1930)).

Where the bankrupt is a beneficed clergyman, the profits of the benefice which accrue during the bankruptcy do not pass to the trustee. A sequestration, however, of the profits may be obtained, yet such a sum must be left to the clergyman as the bishop shall fix, and a curate's stipend, in respect of duties performed by him during four months before the date of the receiving order and not exceeding £50, must be paid in full in priority to other debts (sect. 50).

Beneficed
clergyman

Reputed Ownership. The doctrine already referred to that certain goods which are in the possession, order, or disposition of the bankrupt, and yet are not his property, are nevertheless divisible amongst the creditors because they are so situated as to lead other persons to believe that they are the property of the bankrupt, is often referred to as the doctrine of "reputed ownership."

Essentials for
application of
doctrine

Whether goods are or are not so situated is a question of fact. In order that the doctrine of reputed ownership may apply, it must be shown that at the commencement of the bankruptcy

Possession,
order, or dis-
position

(a) The goods are in the possession, order, or disposition of the bankrupt ;

Trade or
business

(b) That they are so in this trade or business ;

Reputed
owner

(c) That they are so in such circumstances that he is the reputed owner thereof ;

Consent of
owner

(d) That not only the possession, order, or disposition, but also the possession, order, or disposition in such circumstances as have been mentioned, are with the consent of the true owner.

As to what is reputation of ownership Lord Selborne made the following observations in *Ex parte Watkins* (1873): "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors ; and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership ; that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed ; but the court must judge from the situation of the goods what inference as to ownership might be legitimately drawn from those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who took any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about the particular

goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about the situation could infer the ownership to be in the person having actual possession."

The evidence of the consent of the true owner must depend upon the facts of each particular case, and the whole doctrine of reputed ownership may be ousted by usage of trade or custom. As to the amount and kind of evidence necessary to establish the custom, see *Ex parte Watkins* (1873), *In re Hill* (1875), and *Ex parte Powell* (1875). In some instances judicial notice will be taken of a trade custom, such as that of hotel-keepers to hire furniture (*Crawcour v. Salter* (1881); *In re Tabor* (1920); and antique furniture dealers to take furniture on sale or return (*In re Ford* (1929)). But it was held in *Ex parte Brooks* (1883) that the well-known fact of furniture dealers letting out furniture on hire-purchase or other agreement did not entitle the general public to draw the inference that no man was the owner of the furniture in his own house. Customs have been set up, however, in the following trades: Boarding-house keeper, coach builder, clock maker, bookseller, piano-hiring, horse dealer, and antique furniture dealer

Consent of owner

Trade or custom

Apparently the owner must consent to the use in the trade or business. Thus in *Lamb v. Wright & Co.* (1924), where a car was obtained on hire-purchase terms for private use and used occasionally for business, it was held not to be in reputed ownership for the purpose of his trade or business.

An interesting case on reputed ownership is that of *In re Watson & Co.* (1904). A firm X, who had carried on business as bankers and agents, had been in the habit of introducing their customers to wholesale firms for the purchase of various articles, and amongst them to Y. X received from Y certain silver and electro-plated articles as samples, with a consignment note giving particulars of the articles and their prices, and the correspondence between the parties showed

that they were received by X only as samples, and were to be put into their show-cases as such, and were to remain at the risk of Y, and there was nothing to authorise X to take upon themselves the order and disposition of the goods. X also dealt in goods of the same kind on their own account, but the samples of Y were generally dealt with by them in a different way from the way in which they dealt with their own goods. The samples of Y were in the possession of X at the date of their bankruptcy. It was held that Y had not acquiesced in the bankrupts' so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or to induce customers to presume such ownership; and that the articles were not in the order and disposition of the bankrupts under such circumstances that they were the reputed owners thereof within the meaning of the Bankruptcy Act, 1914.

The reputed ownership clause applies only to traders, and provides the only difference in the Bankruptcy Act between traders and non-traders.

Choses in
action

It should be observed that things in action are not subject to the doctrine of reputed ownership except for debts due or growing due to the bankrupt in the course of his trade (1914 Act, sect. 38). In *Blakey v. Pendlebury Trustees* (1931) it was held that instalments due in the future under a hire-purchase agreement are debts "due or growing due," although the agreement might be determined by the hirer at any time.

Fraudulent
preferences

Invalid Assignments of Property. In addition to the property which devolves upon a trustee in accordance with what has been stated in the preceding section, it may happen that the trustee will be entitled to other property of which the bankrupt has made assignments within a period which renders such assignments invalid. It has been already stated that fraudulent preferences made within three months of the date of the presentation of the bankruptcy petition are void—that is, every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred,

and every judicial proceeding taken or suffered in favour of any creditor with a view to giving such creditor a preference over other creditors. But in order to entitle the trustee to set aside the conveyance or preference, however, it must be proved that the bankrupt was unable to pay his debts as they became due, that the object was to give the creditor a preference over other creditors, and that the person making the preference was adjudged bankrupt on a petition presented within three months after the date of making the preference. In judging whether a fraudulent preference has been made, the whole of the circumstances of the case will be considered. No payment of a debt will be held to be a fraudulent preference which is not a payment made with the free will of the bankrupt. Any legal pressure, or even a resolution on the part of the bankrupt, to repair a wrong which he has committed, e.g. if he has committed a breach of trust, will be sufficient to exclude the idea of fraudulent preference. On these points the cases of **Ex parte Taylor** (1886), *Sharp v. Jackson* (1899), and *In re Lake* (1901), should be consulted. In the last-named case a trustee of a settlement who had misappropriated the trust fund, subsequently, on the eve of his bankruptcy, deposited in the trust box (which was then in his custody as solicitor to the trust) voluntarily, and without having communicated with his contractee or *cestui que trust*, certain debentures which were his own property, accompanied by a memorandum admitting his breach of trust, expressing gratitude for the kindnesses which he had received from the beneficiaries during his pecuniary difficulties, and stating that the deposit was made in order to make good the breach of trust of which he had been guilty. It was held that the bankrupt, for the reason shown in the memorandum, had not made the deposit from a dominant motive to prefer the beneficiaries under the trust, but in order to repair the wrong that he had done, and that, therefore, the transaction could not be set aside as a fraudulent preference.

Fraudulent preference may, however, result from

payments made by an agent within the scope of his employment (*In re Drabble Bros.* (1930)).

Voluntary
conveyances

By sect. 172 of the Law of Property Act, 1925, it is provided that every conveyance of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced. This section does not extend to any estate or interest conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors. Although this provision does not affect the law of bankruptcy, it is useful in that it enables certain fraudulent conveyances to be set aside when made at any period.

Voluntary
settlements

But there are other transactions which may be declared invalid though dating much further back than three months before the date of the receiving order. The principal of these are voluntary settlements, "settlement" here includes any conveyance or transfer of property. A voluntary settlement is one which is made in consideration of natural love and affection, which, although designated "good" in law, is not valuable. Settlements made for valuable consideration, which includes marriage, cannot be set aside except on the ground of fraud. The voluntary settlements affected by the bankruptcy laws are (1) those made within two years and (2) those made within ten years of the bankruptcy. The first are absolutely void against the trustee in bankruptcy; and so are the second, unless it is shown that at the time of making the settlement the bankrupt was perfectly solvent without taking into consideration the property included in the settlement (sect. 42).

This matter is so frequently misunderstood that an illustration may serve to make it clearer. A is entitled to, or owns, certain property. If at any time he parts with the same to a *bona fide* purchaser, or makes a settlement of it in favour of another person from whom he receives what is equivalent to a valuable consideration—something which is not illusory or a cloak for fraud—the settlement is good and the trustee has no

claim upon the property. The same rule holds good if the settlement is made before, and in consideration of, marriage. But if, for example, after marriage A settles his property upon his wife, without taking any value for it, the settlement is absolutely void if it is made within two years of the date of the commencement of the bankruptcy proceedings against him, and it is also void if made within ten years, unless A can clearly prove that at the time he made the settlement his remaining property was sufficient to meet the whole of his existing liabilities. A settlement made upon a wife after marriage is good, however, if the property settled has accrued to the settlor in his wife's right.

An invalid assignment cannot be set aside if the property has been transferred by the assignee to a third person for value.

As has already been stated, a voluntary settlement includes any voluntary conveyance or transfer of property, but it does not include gifts where there is no intention that the property should be preserved (*In re Player* (1885)), e.g. a gift to enable a child of the debtor to start in business.

A covenant by the settlor in consideration of marriage, for the future payment or settlement, for the benefit of the settlor's wife or husband or children, of money or property wherein at the date of the marriage the settlor had no estate or interest, and not being money or property in right of the settlor's wife or husband is void against the trustee in bankruptcy if the settlor is adjudged bankrupt and the covenant has not been executed at the date of the commencement of the bankruptcy. The persons entitled under the covenant may claim for dividend in the settlor's bankruptcy, but such claim is postponed until all claims of other creditors for valuable consideration in money or money's worth have been satisfied.

Moreover, any payment of money, other than a payment of premiums on a policy of life assurance, or any transfer of property made in pursuance of such a covenant as is above referred to is void unless

Covenant to settle future-acquired property

Covenant not executed at time of bankruptcy

Covenant executed at time of bankruptcy

the persons to whom payment or transfer was made prove—

(1) That the payment or transfer was made more than two years before the date of the commencement of the bankruptcy; or

(2) That at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or

(3) That the payment or transfer was made in pursuance of a covenant to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant and was made within three months after the money or property came into the possession of the settlor.

Disclaimer. Some of the property of the debtor may be saddled with considerable burdens, and the retention of it by the trustee in bankruptcy would diminish, rather than increase, the total amount of money realisable for distribution amongst the creditors. In such a case the trustee is entitled within certain limits by virtue of the provisions of sect. 54 of the Bankruptcy Act, 1914, to disclaim the property.

Where any part of the property of the bankrupt consists (1) of land burdened with onerous covenants, (2) of shares or stock in companies, (3) of unprofitable contracts, or (4) of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee, disclaim the property.

Where, however, any such property has not come to the knowledge of the trustee within one month after his appointment, he may disclaim such property at any time within twelve months after he first became aware thereof.

What property may be disclaimed

The disclaimer operates to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him. However, if a trustee goes into possession of onerous property and subsequently disclaims it he is liable for rates during occupation (*In re Lister*; *Ex parte Bradford Corporation* (1926)).

Effect of disclaimer

A trustee is not entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the court thinks just.

Disclaimer of lease—leave of court

It has already been pointed out that as a general rule disclaimer can be made at any time within twelve months of the appointment of the trustee; the Act provides, however, that the trustee is not entitled to disclaim any property in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the court, declined or neglected to give notice whether he disclaims the property or not. In the case of a contract, if the trustee, after such application, does not within the said period disclaim the contract, he is deemed to have adopted it.

Time within which disclaimer must be made

The court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to

Power of court to rescind contract on application

the court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

Power of court
to vest prop-
erty in inter-
ested party

The court may, on application by any person claiming any interest in any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just. Where the property disclaimed is of a leasehold nature, the court may not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order under such terms is excluded from all interest in and security upon the property, and if there is no person claiming under the bankrupt who is willing to accept an order upon such terms, the court has power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

Party injured
by disclaimer
as creditor

Any person injured by the operation of a disclaimer is deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy.

Defined

Secured Creditors. A creditor who holds a mortgage, charge, or lien upon any of the property is said to be "secured." Any person who has placed himself in this position is distinguished from the other creditors who are unprotected, and who are called "unsecured creditors." If the security is a valuable one and

sufficient to meet his debt the secured creditor has nothing to fear from the fact of bankruptcy—he will get paid in any event, even though the other creditors have to be satisfied with very little or nothing at all.

It is generally the best thing for a secured creditor to have nothing to do with the general bankruptcy proceedings. But if he desires to take part in the meetings of creditors, he cannot vote unless he has taken certain steps which are indicated in the first schedule of the Bankruptcy Act, 1914. By paragraph 10 of that schedule it is provided, "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence." The trustee or the Official Receiver may, within twenty-eight days after a proof has been put in by a secured creditor, as above, for the purpose of voting at a meeting of creditors, require the creditor to give up the security for the benefit of the creditors generally on payment of the value estimated together with an addition of 20 per cent of such value. But it is further provided that where a creditor has put a value on his security, he may, at any time before he has been required to give up such security, correct his previous valuation by a new proof, and deduct the new value from his debt; but if this amendment has been made the creditor cannot demand the additional 20 per cent before mentioned should the trustee still require the security to be given up.

Voting at
meetings of
creditors

For the purpose of receiving what is due to him upon his debt, the secured creditor has four courses open—

Rights in
bankruptcy

- (1) He may rely on his security and not prove at all.
- (2) He may realise his security and prove for the balance, if any (Schedule II, para. 10).

(3) He may surrender his security and prove for the whole debt (*ibid.*, para. 11).

(4) He may state in his proof the particulars of his security, the date when it was given, and its value. In that case he will be entitled to receive dividends on the balance after deducting the assessed value of the security. He will also be entitled under such circumstances to vote in respect of such amount; but if he votes in respect of the whole debt the secured creditor is considered to have surrendered his security (*ibid.*, para. 12).

The powers of the trustee in bankruptcy, if the secured creditor adopts the last-mentioned course, are

(1) He may at any time redeem the security on payment to the creditor of the assessed value.

(2) If he is dissatisfied with the value at which a security is assessed he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale be by public auction, the creditor, or the trustee on behalf of the estate may bid or purchase.

By notice in writing at any time the creditor may require the trustee to elect whether he will exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not within six months after receiving the notice, signify in writing to the creditor his election to exercise the power he becomes no longer entitled to exercise it.

It should be observed that in proving a debt the affidavit verifying the debt must state whether a creditor is or is not a secured creditor, and if it omits to state that a creditor is a secured creditor the secured creditor surrenders his security for the general benefit of the creditors unless the court is satisfied that the omission has arisen from inadvertence (1914 Act, Schedule II (5); 1926 Act, sect. 11).

Proof of Debts. In order that a creditor may participate in the division of the realised assets of a

bankrupt, he must prove his debt, that is, he must supply the Official Receiver or the trustee in bankruptcy with the necessary information and proof showing that the bankrupt is indebted to him. Some creditors never trouble to prove at all, especially if it is likely that little or no benefit will be obtained by doing so.

A creditor can prove for "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order." It is for the trustee to put an estimate upon the value of any debt or liability which is provable in bankruptcy; but if there is any difficulty or disagreement between the various parties concerned, an appeal may be made to the court. But demands in the nature of unliquidated damages which do not arise by reason of a contract, promise, or breach of trust cannot be proved in bankruptcy. And if a person has notice that there is an available act of bankruptcy against a debtor, such person cannot prove for any debt or liability which has been contracted by the debtor subsequently to the date of such notice.

What debt may be proved

Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made and any other person proving or claiming to prove a debt under such receiving order, an account is taken of what is due from one party to the other in respect of the mutual dealings, and the sum found due by one party is set off against that found due by the other. The balance of the account is the sum which can be claimed by either side. The benefit of a set-off cannot be claimed against the property of a debtor in any bankruptcy proceedings where the creditor had notice of an available act of bankruptcy committed by the debtor when the credit was given to

Set-off

m. be

If a debt is provable, interest may be added to the amount of the debt if the debtor has agreed to pay such interest to the creditor. But no greater rate than 5 per

Interest on debt

cent is allowed so long as there are creditors whose claims have not been paid in full. If, however, the assets are in excess of the liabilities, and the other creditors have been paid, a creditor who has stipulated with the debtor for a rate of interest exceeding 5 per cent is entitled to put in his claim for such interest in addition to his debt (Bankruptcy Act, 1914, sect. 66).

Debts postponed to claims of creditors

It has been already noticed in the chapter on Partnership that a loan in consideration of a share in the profits of a partnership is postponed to the claims of creditors. Also if a husband advances money to his wife or a wife advances money to her husband for use in her or his trade or business, he or she cannot enter into competition with the ordinary creditors of the wife or husband, should she or he become bankrupt. The husband or wife must wait until all the other creditors are paid in full before he or she is entitled to receive anything.

Mode of proof

A creditor who proves his debt sends an account of the same to the trustee or the Official Receiver in the prescribed form. The proof must be accompanied by an affidavit verifying the debt, and, if the trustee requires it, vouchers and all particulars showing the truth and accuracy of the claim must be produced. The affidavit must state whether or not the creditor is a secured creditor, failure in this respect resulting in the forfeiture of the security unless the court is satisfied that the failure was due to inadvertence. The trustee must state within twenty-eight days of the receipt of the proof whether he admits it or rejects it. He may adopt a third course and require further evidence as to the nature of the debt. These notices must be in writing. The decision of the trustee upon proof of debts is always open to revision by the court. It is advisable to send in proofs as early as possible, because no person who has not sent in a proof can participate in any dividend that is declared. A creditor proving his debt must deduct all trade discounts, but he is not compelled to deduct any discount not exceeding 5 per cent on the net amount of his claim, which he may have agreed to allow for payment in cash.

Distribution of Property. When the trustee has realised the whole or a portion of the debtor's property, it is his duty to divide it rateably among those creditors who have proved their debts, after making deductions for expenses and preferential claims.

The first of these preferential claims are the expenses connected with the bankruptcy proceedings. They must be paid in full if the assets are sufficient to meet them. The principal are the expenses of the Official Receiver, the costs incurred by the petitioning creditor, the allowances made to the debtor by the Official Receiver or the trustee, the expenses of the trustee, the expenses of the committee of inspection, if any, and the remuneration of the trustee.

Expenses of
bankruptcy
proceedings

The next are the claims governed by sect. 33 of the Bankruptcy Act, 1914, which are similar to the claims made and payable in the winding up of companies (see page 222, *ante*). If the bankrupt is a farmer and one of the creditors is an agricultural labourer who has made an agreement with the farmer to be paid a fixed sum at the end of the year of hiring, such labourer is a preferential creditor to the extent of an amount proportionate to the length of service up to the date of the receiving order. Any abatement that has to be made in these preferential payments must be made equally amongst all the classes which have these prior claims.

Preferential
payments

A preferential claim is allowed in cases of apprenticeship where a master becomes bankrupt during the currency of the apprenticeship. The amount to be repaid to the apprentice varies according to the time of service. The trustee may, however, arrange to transfer the indenture of apprenticeship or articles of agreement to some other persons (Bankruptcy Act, 1914, sect. 34).

Apprentice
claims

There is a further preferential right given to Friendly Societies by the Friendly Societies Act, 1896 (59 & 60 Vict., c. 25), sect. 35. If an officer of a Friendly Society becomes bankrupt, and has at the time of the receiving order being made against him moneys of the society in his possession, by virtue of the office which he holds, these moneys are repayable to the society in full in

Friendly
societies and
savings banks

preference to the claims of the ordinary creditors. There is a similar right given where an officer of a savings bank becomes bankrupt (Trustee Savings Bank Act, 1863 (26 & 27 Vict., c. 87), sect. 14). These debts have priority over even the preferred debts under sect. 33.

Landlords' claims

The position of the landlord of the bankrupt is exceptional, and is provided for by sects. 33 (4) and 35 of the Act of 1914. If he distrains—and he has no preferential claim unless he does so—within three months of the receiving order being made, he must pay the preferential creditors out of the proceeds of the distress, and if he suffers any loss, then he becomes a preferential creditor to the extent of that loss (sect. 33 (4)).

As against preferred creditors

As against ordinary creditors

As against the other creditors of the bankrupt, the landlord can distrain for the whole rent which is due to him. But if he distrains after the commencement of the bankruptcy, he is entitled to only six months' rent accrued due prior to the date of the order of adjudication. As to any balance which is then remaining due, the landlord is in the same position as an ordinary creditor (sect. 35).

Dividend

The residue of the property, if any, in the hands of the trustee is payable to the creditors in proportion to the amount of their debts. Due notice must be given to all the creditors who have proved that a dividend is to be paid. The Board of Trade must likewise be informed of the proposed payment, and the fact of the intention of the trustee to make it must be announced in the *Gazette*.

Summary administration

Small Bankruptcies. When it is clear that the estate of the debtor is of less value than £300, the court may order it to be summarily administered under the provisions of sect. 129 of the 1914 Act. The Official Receiver acts as trustee throughout, there is no committee of inspection, and the proceedings are modified in several respects. Expedition and a saving of expense are thus attained.

Administration order

If, when a judgment is obtained in the County Court, the debtor is unable to pay, and it appears that his

indebtedness is not more than £50, the court may make an administration order and compel the debtor to pay the whole or a portion of his debts, either at once or by instalments. This method of administration in the case of small estates, which is available only on the application of a judgment debtor in the County Court, is provided by sect. 122 of the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52).

Position of Bankrupt. From the time when the receiving order is made until he has obtained his discharge, the bankrupt is bound to do whatever is necessary to assist the Official Receiver or the trustee in the settlement of his affairs. For this purpose an allowance may be made to him out of the estate. He must attend upon the Official Receiver for his private examination, if required to do so, and present himself for his public examination, unless he is prevented from attending by reason of ill-health.

Under sect. 23 of the Bankruptcy Act, 1914, the bankrupt is liable to arrest if he appears likely to abscond and to avoid the bankruptcy proceedings which have been instituted against him. He is further liable to arrest and imprisonment if he interferes with what was his property until the date of the receiving order, or attempts to remove goods of the value of £5 without the permission of the Official Receiver or trustee.

The offences for which a bankrupt may be criminally punished, connected with frauds upon creditors, are beyond the scope of this work. They will be found set out in sects. 154 to 166 of the Act of 1914, as amended by sects. 5 to 10 of the Bankruptcy (Amendment) Act, 1926.

An important provision concerning books of account is contained in sect. 7 of the 1926 Act. It is provided that any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made is guilty of a misdemeanour if, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation

Books of
account

of the petition, he has not kept proper books of account throughout that period or has not preserved all books of account so kept.

Exceptions are made to this rule where the unsecured liabilities of the bankrupt do not exceed £500 (£100 in case of a second bankruptcy) or if it is proved that in the circumstances the omission was honest and excusable. In *R. v. Dandridge* (1931) it was held that an omission to keep books, though honest, was not necessarily excusable. As will be seen later, failure to keep proper books of account is sometimes a ground for refusing discharge.

Discharge of Bankrupt. As it often takes a considerable time for the trustee in bankruptcy to realise the debtor's estate, it would be unfair to compel the bankrupt to wait until the realisation was complete in order to release him from his liabilities and allow him to make a fresh start in life. Generally the debtor is not a necessary party to the winding up of his affairs after the closing of the public examination, and he may, therefore, apply to the court for an order of discharge any time after its conclusion. A notice of fourteen days must be given to all the creditors who have proved in the bankruptcy, and the application for discharge may be opposed by any creditor, or by the trustee, or by the Official Receiver.

Application
for discharge

When court
will grant
discharge

In considering the application the court will take into account the whole of the facts laid before it, and especially the report of the Official Receiver as to the conduct of the bankrupt and the manner in which he has managed his affairs. It may then refuse an order of discharge absolutely, grant it subject to certain conditions or after a fixed time, or, unless there are statutory reasons to the contrary, grant it immediately. Where a discharge is granted conditionally, it may be revoked by the debtor's failing to fulfil the conditions upon which it was obtained (*In re Summers* (1907)).

When dis-
charge will be
refused

The court must either refuse the discharge or suspend it for such period as the court thinks proper or until the bankrupt has paid a dividend of 10s. in the £, or grant

it subject to the debtor's consenting to judgment being entered up against him for any part of his unpaid provable debts (such debts to be paid out of future earnings or after-acquired property), if the debtor has committed any criminal offence against the bankruptcy laws, and in the following cases—

(a) When the assets are insufficient to pay a dividend of 10s. in the £ to the unsecured creditors, unless this is due to circumstances for which the debtor cannot be held responsible.

(b) When proper books of account have not been kept during the three years preceding the bankruptcy.

(c) When the bankrupt has continued to trade after knowing that he was insolvent.

(d) When debts have been contracted without any reasonable prospect of an ability to pay them.

(e) When a loss or a deficiency of assets has not been satisfactorily accounted for.

(f) When the insolvency has been brought about by rash and hazardous speculation, unjustifiable extravagance in living, gambling, or culpable neglect of business.

(g) When a creditor has been put to unnecessary expense by a frivolous and vexatious defence to an action properly brought against the bankrupt.

(h) When the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action.

(i) When an undue preference has been given to any creditor within three months of the date of the receiving order.

(j) When the bankrupt has, within three months preceding the date of the receiving order, incurred liabilities with a view to making his assets equal to 10s. in the £ on the amount of his unsecured liabilities.

(k) When there have been previous bankruptcy proceedings against the debtor, or when he has previously made a composition with his creditors.

(l) When the bankrupt has been guilty of any fraud or fraudulent breach of trust.

Disabilities as
undischarged
bankrupt

So long as he remains undischarged, a bankrupt suffers from a considerable number of disabilities. He cannot

(1) Sit or vote in the House of Lords, or any committee thereof, or be elected as a Scotch or Irish representative peer;

(2) Be elected to, or sit or vote in, the House of Commons;

(3) Be appointed, or act as, a justice of the peace;

(4) Be elected, or hold the office of mayor, alderman, or councillor;

(5) Be elected, or sit as, a member of a burial board;

(6) Be elected, or sit as, a county councillor.

(7) Be engaged in the management or direction of a limited company unless with consent of Court.

If a person is adjudicated a bankrupt whilst holding any of the last three positions, the office will at once become vacant.

Duration of
disqualifica-
tion

The disqualification of the bankrupt lasts for five years from the date of the discharge. If the adjudication is annulled the disqualification ceases at once, and it also ceases at once if the debtor obtains his discharge with a certificate to the effect that the bankruptcy was caused by misfortune, without any misconduct on his part.

Certificate of
misfortune

Obtaining
credit

An undischarged bankrupt is liable to one year's imprisonment (*R. v. Turner* (1904)) if he obtains credit, either alone or jointly, to the extent of £10, whether fraudulently or not (*R. v. Dyson* (1894)), without disclosing the fact of his being an undischarged bankrupt.

Trading in
name other
than that in
which adjudicated bank-
rupt

It is also an offence for an undischarged bankrupt to trade in a name other than that under which he was adjudicated bankrupt, unless he discloses to all persons with whom he enters into any business relationship the name under which he was adjudicated bankrupt.

Effect of
discharge

As soon as the discharge takes effect, the debtor is released from all debts provable in bankruptcy, except—

(1) Debts due to the Crown,

(2) Debts incurred through fraud, or through a fraudulent breach of trust,

(3) Judgment debts in an action for seduction, in affiliation proceedings, or in a matrimonial cause.

If an order of discharge is made to take effect after a certain period, no further application to the court is necessary. As soon as the time has elapsed the discharge is complete.

Second Bankruptcy. When a second or subsequent receiving order is made against a bankrupt the trustee in the preceding bankruptcy is deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy. Any property acquired by the bankrupt since the preceding adjudication which has not been distributed among the creditors vests in the trustee in the subsequent bankruptcy, and where the trustee in any bankruptcy receives notice of a subsequent petition against the bankrupt he must hold any property which has been acquired by the bankrupt since his adjudication until the subsequent petition has been disposed of, and if an order of adjudication is made he must transfer all such property to the trustee in the subsequent bankruptcy.

Position of
trustee in
first bank-
ruptcy

Annulment of Proceedings. The court has power to annul any receiving order which has been made upon improper grounds. It will do so, as has been shown, if the presentation of a petition by the debtor is an abuse of the process of the court. But the court will always act with great caution, and will make no rescission except under special circumstances which make it quite clear that any arrangement which has been made between the debtor and his creditors is for the benefit of the creditors, and that the debtor has not been guilty of any misconduct in connection with the bankruptcy proceedings (*In re Izod* (1898)). A receiving order may also be rescinded where it appears to the court by whom the order was made, upon an application by the official receiver, that the majority of the creditors are resident in Scotland or Ireland, and that the estate ought to be distributed according to the law of Scotland or Ireland.

When receiv-
ing order
rescinded

Arrangement
for benefit
of creditors

Estate to be
distributed
under Scottish
or Irish law

Effect of pay-
ment in full
or satisfaction
of creditors

Further, the adjudication will not be annulled unless the court is of opinion that the debtor ought not to have been made bankrupt, or that some satisfaction has been made to the creditors, either by payment in full of his debts or by some scheme of arrangement being accepted by the creditors. But it does not follow as a matter of course that the adjudication will be annulled because the bankrupt has paid his debts in full. Thus, *In re Taylor* (1901), where a bankrupt, in his statement of affairs, and on his public examination, concealed the fact that he possessed a large sum of money, and afterwards handed to the Official Receiver a portion of that money sufficient to pay his debts in full, with interest and expenses, and applied for an order annulling his adjudication, the annulment was refused. Again, in *In re Beer* (1903), it appeared that the creditors of a bankrupt, whose discharge had been suspended for two and a half years, after the period of suspension had expired resolved by the proper majority to entertain a proposal by the bankrupt to pay a composition of 7s. 11d. in the £ in addition to a dividend of 2s. 11d. in the £ which had been paid in the bankruptcy, on condition that the bankruptcy should be annulled. It was held that, in the exercise of its discretion, the court ought to consider, not only the interest of the creditors, but also the interests of the public and of commercial morality, and that, having regard to the facts found by the Official Receiver in his report on the bankrupt's application for his discharge, the bankruptcy ought not to be annulled.

Effect of
annulment

If there is an annulment, the debtor is placed in the same position in which he would have been if no bankruptcy proceedings had taken place.

Administra-
tion of estate
in bank-
ruptcy

Debtor Dying Insolvent. The estate of a debtor who dies insolvent may be administered in bankruptcy in the manner prescribed by sect. 130 of the Bankruptcy Act, 1914. Any creditor or the legal personal representative of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor had he been alive, may present a petition

praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy. On notice being given to the personal representative of the deceased debtor, the court may either make the order or dismiss the petition with or without costs. If an order is made, the property of the debtor vests in the official receiver as trustee, and it is his duty to realise it and distribute it in accordance with the provisions of the Bankruptcy Act. The creditors, however, have the same powers as to appointment of trustees and committees of inspection as they have in other cases of administration in bankruptcy. Funeral and testamentary expenses incurred by the personal representative constitute a preferential debt, and are payable in full in priority to all other debts. Any surplus, after payment of all debts due together with the costs of the administration, is paid over to the personal representative of the deceased debtor's estate. Notice to the personal representative of a deceased debtor of the presentation of a petition under sect. 130 is deemed to be equivalent to notice of an act of bankruptcy, and thereafter no payment or transfer of property must be made by the personal representative.

Deeds of Arrangement. As a rule a deed of arrangement takes the form of an assignment of the debtor's property for the benefit of his creditors generally or of an agreement for a composition. In both cases the creditors release the debtor from his debts and forbear to sue in consideration of the benefits they receive under the deed. The object of a deed of arrangement is to avoid the delay produced by bankruptcy proceedings and to eliminate official interferences in the affairs of the bankrupt.

By the Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), a deed of arrangement must be registered within seven days after execution with the Registrar of Bills of Sale. It is further necessary that, within twenty-one days of registration, it shall receive the assent of a majority in number and value of the

Registrar

creditors. The trustee under the deed must file a statutory declaration that such assent has been obtained.

It should be observed that an assignment for the benefit of creditors amounts to an act of bankruptcy on which a creditor may present a petition within three months. The trustee therefore should not distribute the assets until the time for the presentation of a petition had passed. Sect. 24 of the Deeds of Arrangement Act, 1914, provides, however, for the service on the creditors of a notice of execution of the deed and of the filing of the creditor's assent, intimating that they may present a bankruptcy petition within one month from receipt of the notice. If no petition is presented within the month the trustee may proceed to distribution.

The provisions of the Deeds of Arrangement Act, 1914, with regard to registration and certain other matters apply to instruments executed for the benefit of any three or more creditors, but otherwise the Act applies only to deeds for the benefit of creditors generally.

PART VI

MISCELLANEOUS MATTERS

CHAPTER XXIII

ARBITRATION

THE English courts of law are, theoretically, open to all persons who claim to seek redress for some infringement of their legal rights; and by the common law it was considered to be contrary to public policy for any agreement to be made which ousted the jurisdiction of the courts. Now, however, it is quite valid to enter into an arrangement in writing, by which the parties agree that no proceedings shall be taken in a court of law until there has been a reference to arbitration, and in a proper case all proceedings in court will be stayed until such arbitration has been carried out. An agreement of this kind is known as a submission to arbitration.

It is a common stipulation in many written contracts, such as those connected with insurance, building operations, etc., that any dispute arising thereunder shall not be made the subject of proceedings in court until the award of an arbitrator has been obtained thereon. The person who is appointed to determine differences and disputes out of court is called the arbitrator, the proceedings before him are called an arbitration, and his decision is known as an award.

How Right to Arbitrate Arises. There are two chief methods of arbitration—

(1) By consent out of court. That is to say, there is a submission to arbitration by the parties to the dispute. This method of arbitration is governed by sects. 1-12 of the Arbitration Act, 1889 (52 & 53 Vict., c. 49).

(2) By order of the court. This form of arbitration is governed by sects. 88-92 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5,

Methods of
arbitration

(1) Consent
out of court

(2) Order of
court

c. 49), which have replaced certain sections of the Arbitration Act, 1889.

Under
statutory
powers

By sect. 24 of the Act of 1889 its provisions are applied to arbitrations under any other statutes authorising submissions to arbitration except where the provisions of those statutes are inconsistent with the provisions of the Arbitration Act. It should be observed, however, that certain statutes have expressly excluded the operation of the Arbitration Act, e.g. Workmen's Compensation Act, 1925; Rating and Valuation Act, 1925.

Inherent
jurisdiction
of court

The court still has inherent jurisdiction, with the consent of the parties, apart from any jurisdiction conferred by the Arbitration Act, to refer a matter in dispute to arbitration.

Where such a reference is made, the conduct of the arbitration is regulated by the provisions of the Arbitration Act as to "References by Consent Out of Court."

Any reference must be conducted in accordance with the prescribed rules of the court, and, subject thereto, as the court or a judge may direct. The court has power, moreover, to order that any special question arising in an action shall be referred for inquiry or report to any official or special referee, whose report may be adopted, either in whole or in part, by the court or a judge. A reference of this kind, however, is not strictly an arbitration. No purely criminal matter can be decided by arbitration, as the court will not allow itself to be deprived of its proper jurisdiction in such matters. But if it is a question of damages sustained, for which a person is liable civilly, even though he may also be liable to prosecution, an inquiry in the nature of an arbitration may be made as to the amount of the damages.

Arbitration
clause

I. Consent Out of Court. Very great care should be exercised in examining the clause in any contract which deals with arbitration, as it may easily be made a weapon of oppression. It has been related that a certain fire insurance company, by its clause as to arbitration, stipulated that each party should pay

one-half of the total costs connected with any inquiry to be held in case a dispute arose. It is obvious that, by such a term, the company penalised those who were insured whenever the loss was not a very great one.

The Submission. Every voluntary reference out of court must originate in a submission, which is defined as being a written agreement to submit present or future differences to arbitration (Arbitration Act, 1889, sect. 27). A submission is deemed to be irrevocable, except by leave of the court or a judge, unless a contrary intention is expressed therein (sect. 1). It must be signed by or on behalf of the parties, and except in so far as it expressly negatives any of them, will be deemed to contain the following provisions—

Irrevocable

1. If no other mode of reference is provided, the reference shall be to a single arbitrator.

Contents of submission

2. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

3. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

4. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

6. The parties to the reference, and all persons

claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

7. The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

8. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

9. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client. (Sect. 2 and Schedule 1.)

Effect on legal proceedings

A submission to arbitration does not of necessity bar legal proceedings. But if an action is commenced by one of the parties in a dispute, the court may, on the application of the other party, stay the action if the applicant has not taken any step in the action (except putting in an appearance), and there is no sufficient reason why the dispute should not be referred, and the applicant is ready and willing to do all things necessary to the proper conduct of the arbitration (sect. 4).

Enlargement of time for making award

An arbitrator has no power to alter the terms of a submission, but the parties themselves may agree to do so, and the court may, if applied to, give effect to the real intention of the parties, unless it involves the introduction of new matter. Thus, it can enlarge the time for the making of the award, even though the period in which it ought to have been made has expired (sect. 9).

A submission under seal requires a 10s. impressed stamp; if under hand, a 6d. stamp must be affixed or impressed, unless the subject-matter is under £5 in value, when no stamp is required.

The Arbitrator. The parties may appoint anyone they please as arbitrator or arbitrators, or as umpire, either by naming him or them in the submission, or when the difference or dispute arises for reference. Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy; or where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and do not appoint him; or where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator. If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who will have the like powers to act in the reference and make an award, as if he had been appointed by consent of all parties (sect. 5). The court has a discretion and in a proper case may refuse to make an appointment of an arbitrator except upon terms (*Re Bjornstad & Ouse Shipping Co.* (1924)). It should be noticed that only a party to the submission can apply under sect. 5. Where articles of partnership provided that a partner could nominate a successor with the consent of the other partners and provided further that, in the event of the consent being

Stamp

Appointment

Notice to
appointAppointment
by court

unreasonably withheld, any partner or the nominee could require the matter to be settled by arbitration, the court held that the nominee could not apply under sect. 5 as he was not a party to the submission (*In re Franklin & Swathling's Arbitration* (1929)).

Power of
parties to
supply
vacancy

Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention, if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; and if one party fails to appoint an arbitrator, either originally or by way of substitution, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award will be binding on both parties as if he had been appointed by consent. The court or a judge may set aside any such appointment (sect. 6).

Appointment
of umpire

If two arbitrators have to appoint an umpire, the latter must be deliberately chosen, and not selected by chance or lot; but the arbitrators may draw lots as to which one of certain selected fit persons shall be appointed.

Reference to
three
arbitrators

If the submission provides that the reference shall be to three arbitrators, one to be appointed by each party and the third by those two, and one of the parties fails to appoint his arbitrator, the other party may appoint his arbitrator to act alone. If the arbitrators fail to appoint the third arbitrator the appointment will be made by the court (Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), sect. 16).

Powers of
arbitrators

Unless the submission provides to the contrary, the arbitrators or the umpire have power to administer oaths to or take the affirmations of the parties and witnesses, to state their award, or part thereof, in the form of a special case for the opinion of the court and to correct any clerical mistakes or accidental errors or

omissions in the award (sect. 7). They may obtain legal assistance to frame the award but this should not be done without the consent of the parties.

An arbitrator or an umpire must undertake the reference himself—he cannot delegate his powers—and if he is guilty of any misconduct in the arbitration he may be removed by order of the court, or his award may be set aside. The award may also be avoided if it has been improperly procured (sect. 11). It is not easy to say what will amount to misconduct or improper procurement, but the following matters have been held to justify either removal or setting aside: Taking evidence in the absence and without the knowledge of a party having an interest in the subject-matter of the reference (*Ramsden & Co. v. Jacobs* (1922); but see *French Government v. "Tsurushima Maru" (Owners)* (1921), where the umpire lightly gave his decision, without taking evidence, relying on the case put by the arbitrators), giving a decision intentionally contrary to law, making an obvious mistake as to the law, receiving a bribe or some improper inducement to decide in favour of a particular party, refusing to hear witnesses, and making extravagant charges by way of remuneration.

Misconduct of
arbitrator and
improper
awards

Conduct of the Arbitration. An arbitrator or arbitrators, when called upon to act, must give proper notice to the parties of the time and place when and where the arbitration will be held. If these are reasonably fixed and one party refuses to attend, the arbitration may proceed in his absence; but if the party has a reasonable excuse for non-attendance, the arbitrator should adjourn the proceedings to a convenient time and place. Subject to any special directions contained in the submission, the proceedings should be conducted so far as is reasonably practicable in the same way as an action in the courts, and the arbitrator should observe the ordinary rules of evidence, though his award will not be invalidated by a deviation therefrom if no injustice to the parties is caused thereby. Each party must be allowed to adduce all his evidence, and

Attendance
of parties

Rules of
evidence

The award

to be heard fully either in person or by counsel or solicitor. When the hearing has concluded, the arbitrator must proceed without undue delay to consider, and in due course, must make his award or decision. If there are two arbitrators and they cannot agree, the umpire is substituted for them, and has the same powers. It is clearly seen from what has been stated that an arbitration, in form, does not differ in any way from an ordinary trial in court by a judge alone.

Arbitrator giving evidence

In a commercial arbitration, an arbitrator may give evidence on behalf of one of the parties to the arbitration, when, owing to the arbitrators failing to agree, the dispute comes before an umpire (*Bourgeois v. Widdell & Co.* (1924)).

The Award. The time within which the award must be made is within three months of taking up the reference (Schedule 1). The time so fixed may be enlarged by order of the court or a judge.

Time for making award

Form of award

The award must be made in writing, but may be in such form and expressed in such language as the arbitrator or umpire thinks fit. But it must be clear, i.e. it must be certain in meaning, possible, and reasonable, and must finally settle all the differences referred to arbitration. It must be dated, and be signed by all the arbitrators, and, generally, at the same time and in the presence of each other. It must bear a 10s. stamp.

Notice that award ready

When the award is ready, notice should be given to the parties.

Duty to state case

At any stage of an arbitration, the referee, arbitrator, or umpire may, and must if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference (sect. 19), and, unless the submission expresses a contrary intention, he may so state an award (sect. 7). An agreement that the parties shall not require the arbitrator to state a question of law in the form of a special case is void as ousting the jurisdiction of the court and these being contrary to public policy (*Czarnikow & Co. v. Roth, Schmidt & Co.* (1922)). The court or a judge may remit the award for the

reconsideration of the arbitrators or umpire, who in such a case must make their or his award within three months after the date of the order, unless the order otherwise directs (sect. 10). Award remitted

Any order made under the Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just (sect. 20). The discretion of the arbitrator as to costs, however, is not an absolute discretion; it must be exercised judicially (*Lloyd del Pacifico v. Board of Trade* (1930)). Costs

An award may state the amount of the arbitrator's or umpire's charges, and the usual practice is for the amount to be notified to the parties, and for the arbitrators, or the umpire, as the case may be, to keep possession of the document until the charges have been paid. A party paying the charges and taking delivery of the document is said to "take up the award." If the umpire or arbitrator fail to deal with the costs of the reference his award will be remitted for reconsideration (*In re Becker, Shillan & Co. & Barry Bros.* (1921)). An award made on a written submission may, by leave of the High Court of Justice, be enforced in the same way as a judgment or order to the same effect, i.e. by execution, attachment, or action (sect. 12). Arbitrator's or umpire's charges

II. Order of the Court. The second manner in which arbitration arises is by reference under order of the court. The statutory provisions dealing with this matter were formerly contained in the Arbitration Act, but by the Supreme Court of Judicature (Consolidation) Act, 1925, they were repealed and substantially re-enacted in sects. 88-92 of that Act.

Reference for Report. Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer to any official or special referee for inquiry or report, any question arising in any "cause or matter" other than a criminal proceeding (sect. 88). Power to refer question arising in cause or matter

Special Power to Refer. The court or judge may order the whole cause or matter or any question or issue of fact arising therein to be tried before a special referee

or arbitrator agreed upon by the parties or before an official referee or officer of the court in the following circumstances (sect. 89):

By consent

(1) If all the parties interested who are not under disability consent; or

Prolonged
examination
of documents
or scientific
investigation
required

(2) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or judge conveniently be made before a jury or conducted by the court through its other ordinary officers; or

Questions of
account

(3) If the question in dispute consists wholly or in part of matters of account.

Powers

Powers and Remuneration of Referees and Arbitrators. In all cases of reference to an official or special referee or arbitrator the official or special referee or arbitrator is an officer of the court and must conduct the reference as directed by the court or judge. Unless set aside by the court the report or award is equivalent to the verdict of a jury. The remuneration to be paid to a special referee or arbitrator is determined by the court or a judge (sect. 90).

Remunera-
tion

CHAPTER XXIV

CONFLICT OF LAWS

Jurisdiction over Aliens Contracting in England. General rule
 As a general rule the English courts have jurisdiction, subject to the exception noticed at page 24, *ante*, over all persons resident in this country in respect of all transactions therein. If an alien settles in England and has a fixed determination of making his permanent home here, he is said to possess an English domicile, and it is immaterial whether he intends to become a naturalised citizen or not. Aliens who are not domiciled are subject in all respects to the law of England so long as they are resident here; and it is the general opinion, although the point is not quite free from doubt, that their capacity to enter into the ordinary mercantile contracts is governed by the law of this country when the contract is made in England (*Male v. Roberts* (1800); *Sottomayor v. De Barros* (1879)).

English domicile

English residence

Contract made in England

Contract to be Carried Out Abroad. When a contract is made between two persons with respect to a transaction to be carried out in another country, two questions arise: (1) In which country is an action to be brought for breach of the contract? (2) What are the rights and liabilities which arise under the contract?

Jurisdiction to Entertain Action respecting Contract. In the first place it is to be noticed that the English courts will refuse to entertain any action in respect of any contract concerning title to land situated abroad (*British South Africa Co. v. Companhia de Mozambique* (1893)). This is on the ground that it would be impossible to give effect to a judgment which might not be in harmony with the ideas and the law of the country in which the land is situated. Thus, if a dispute arises as to ownership of immovable property, that is, land, in France, the parties must resort to the French courts for a settlement of their differences, even though the

Contract concerning land abroad

disputants are resident in England. The same rule applies if the land is situated in Scotland or Canada, for since the systems of law of these countries are different from that of England, their law is considered as much foreign law as the law of France. English courts, however, will hear actions arising out of trusts of foreign land, where the parties are within the jurisdiction (*Rochevoucauld v. Boustead* (1897)).

Contract concerning
movables
abroad

A contract relating to movable property is valid in all parts of the world, if it is valid by the law of the country where the contract is made; and for this purpose a contract is supposed to be made at the place where the acceptance of an offer is signified. Therefore, if a contract is made abroad between two aliens, or between an Englishman and an alien, who afterwards take up their residence in this country, an action may be brought upon it in the English courts. As to a tort committed abroad, an action will not lie in England in respect of foreign land, nor otherwise, unless the tort is actionable by English law and is not innocent according to the law of the country where the tort was committed. But if one only of the parties is resident in England, the possibility of bringing an action in an English court will depend upon whether service of the writ can be effected upon the defendant. The cases in which this can be done are fully set out in Order XI of the Rules of the Supreme Court, to which reference should be made. The most important provisions of the Order, however, as amended by subsequent Orders (excluding matters relating to land, which are beyond the scope of this chapter) are to the following effect—

One party
only resident
in England

Service of
writ outside
jurisdiction

R S C. Ord
XI

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever,

(1) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(2) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract,

or to recover damages or other relief for or in respect of the breach of a contract

(a) made within the jurisdiction, or

(b) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(c) by its terms or by implication to be governed by English law,

or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

(3) The action is founded on a tort committed within the jurisdiction.

(4) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(5) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

It should be noticed that if the defendant who is resident abroad is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

If the English courts refuse to entertain jurisdiction, which is quite discretionary, the plaintiff must have recourse for any remedy to the courts of the country in which the defendant is resident.

Effect of refusal of English courts to entertain jurisdiction

Although, as a general rule, as stated below, a contract is to be construed according to the law of the country where it is made, proceedings to enforce it are governed by the law of the country where action is taken. Thus, if an action is brought in England, such defences as are allowed by the fourth section of the

Defences to action to enforce contract

Statute of Frauds or the Statutes of Limitation are effective, even though they have no counterpart in the country where the contract is concluded.

**Enforcement
of judgments**

Where judgment is given in any country in an action against a defendant who is resident in England and has no property in the country where the judgment is pronounced upon which execution can be levied, an action may be brought upon the judgment in this country and, unless fraud is shown (*Abouloff v. Oppenheim* (1883); *Vadala v. Lawes* (1890)), it will be enforced here. An English plaintiff who obtains a judgment in an English court can obtain similar satisfaction in the majority of civilised states.

When bringing an action upon a foreign judgment, it is important to remember that a foreign judgment has not the same weight as an English one. In fact, a foreign judgment creates a simple contract debt, and any action must be taken upon it within six years, otherwise it is barred by the Statute of Limitations (*Dupleix v. de Roven* (1705)). This case has been sometimes questioned, but it is undoubtedly law at the present time.

**Enforcement
of arbitration
award**

The enforcement of foreign arbitration awards in this country has been dealt with in two statutes. By the first, the Arbitration Clauses (Protocol) Act, 1924 (14 & 15 Geo. 5, c. 39), it is provided that in certain cases of agreements for the settlement of disputes by arbitration, if a party to the submission commences proceedings in respect of matters covered by an agreement, the court must stay those proceedings unless the arbitration has become inoperative. By the Arbitration (Foreign Awards) Act, 1930 (20 & 21 Geo. 5, c. 15), the awards made under the submissions above referred to may be enforced in this country. The Act applies only to agreements made in territory to which it is applied by Order in Council or to agreements between persons subject to the jurisdiction of a state brought within the Act.

Rights and Liabilities under Contract. The rights and liabilities of the parties to a contract which is not made in

England, and is not to be carried out in this country, will depend upon circumstances. Very frequently the parties will declare by what law they intend that the contract shall be construed, and if this is so the court in which action is taken, whether English or foreign, will generally give effect to the expressed intention. This is the basis of all the rules for determining the law to be applied to contracts entered into abroad (*Lloyd v. Guibert* (1865)). The intention is to be gathered from the whole contract coupled with the surrounding circumstances (*Royal Exchange Assurance Corporation v. Sjørsforsakringsakt Vega* (1921)).

Depends on
intention

In the absence of any such expressed intention, after much variation of opinion, the English courts have adopted this general rule, that the contract ought to be construed according to the *lex loci contractus*, i.e. the law of the country where the contract is made (*Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890)).

*Lex loci
contractus*

A case upon this subject is that of the *South African Breweries, Ltd. v. King* (1900). The head-note runs as follows: "By an agreement in writing, executed at Johannesburg, in the South African Republic, and made between a company having its registered office in London, but carrying on business in South Africa, and a British subject resident at Johannesburg, the latter agreed to serve the company as brewer or otherwise in its business, carried on at Johannesburg, and in the Colony of Natal and elsewhere, in South Africa, and provision was made for his residence in Johannesburg. The agreement was framed in the English language and was in English form: held, that the rights of the parties under the agreement ought to be governed by the law of the South African Republic."

Where a contract is made in one country and is to be performed in another it is governed by the law of the country where it is to be performed (*Brenaim & Co. v. Debono* (1924)).

Place of
performance

Contracts of affreightment are presumed to be governed by the law of the flag, that is, the law of the

Contracts of
affreightment
and average

country to which the ship belongs, and those of average according to the law of the place at which the voyage terminates. The presumption that a contract is governed by the law of the flag may be rebutted by proof of a contrary intention on the part of the parties. The best criterion is the intention of the parties (*The Adriatic* (1931)).

Foreign bills
of exchange

There are special rules as to the construction of foreign bills of exchange, which are given in the Bills of Exchange Act, 1882.

CHAPTER XXV

PASSING-OFF, SLANDER OF TITLE AND SLANDER OF GOODS

CLOSELY connected with the law of defamation is that of trade libel or slander of goods; in reality it is not part of the law of libel or slander, but in some cases it may approach the border line, where the words complained of combine a disparagement of goods with imputations against the proprietors of the goods. Related to this type of wrong against traders is that of so-called "slander of title," whilst the offence of "passing-off" or substitution is rather more remote from defamation. A brief chapter dealing generally with these matters will not be out of place in this volume.

PASSING-OFF. What are known as "passing-off cases" are cases in which it is alleged that one trader has imposed upon his customer to the extent of representing his goods, or some other person's goods, as those of a third party either by making them up in a similar manner to mislead or by using a name tending to deceive, or more unusually by express statement intended to mislead. It is submitted that a similar offence is committed if an article is *fraudulently* substituted when an article of another trader but of a similar nature is required.

Passing-off
defined

In the general case it is unnecessary to prove fraud; the essence of the wrong is that the public is likely to be misled.

Essence of
offence

The remedy is an injunction and in a proper case damages or an account of profits.

Remedy

The cases in question are not covered by the law relating to trade marks and patents, but are governed by the protection afforded by the common law on the principle that one man may not attract the business of another to his injury by misleading description, make-up, or marking of goods. In *Edge & Sons v. Nicolls & Sons* (1911), in which the House of Lords reversed

Examples

"Get-up" not
suitable for
patent affords
no defence

the decision of the Court of Appeal, it was held that the fact that a manufacturer has taken out a patent which has been revoked on the ground that the "get-up" of his goods is not a suitable subject for a patent is not a good ground on which a rival trader may copy the getting-up of goods so as to resemble goods which have become known on the market by reason of their style. The fact that the rival added a label bearing his name, a precaution not adopted by the original manufacturer, was no protection to the person passing off his goods as those of the plaintiff.

Name tending
to deceive

The use of a name tending to deceive is equally prohibited. The case of *Middlemas & Wood v. Moliver & Co.* (1921), illustrates this point. For many years "Bolivar" has been associated with a well-known brand of cigar. Subsequently defendants put on the market an article of the same kind which they called "La Molivar." The similarity of name was held to be such as tended to deceive and the use of the name was forbidden by injunction. A similar decision was arrived at in *Poiret v. Jules Poiret & Nash* (1919).

Even the use by a person of his own name will be restrained if it is proved that the name is the means of deception (**Lyons & Co. v. Lyons** (1932)).

In *Ideal Werke A. Co. v. Willesden & District Light Supply Co.* (1930), where the defendants sold loud-speaker units under the name "Navy Spot," the court held that they were likely to deceive and be passed off as the plaintiffs "Blue Spot." The "get-up" of the two loudspeakers was similar.

Honest
substitution

In the case of substitution, an inadvertent and accidental substitution is not a subject for damages, and an injunction is not granted where an honest undertaking is given not to substitute goods of another when goods of the complaining trader are required, unless the customer consents to the substitution (*Lever Bros., Ltd. v. Masbro' Equitable Pioneer Society, Ltd.* (1906)).

"Pulling"
assertion

A statement by a former employee of a well-known firm that he is setting up business after a long experience with X. Y. & Co. and is in a position to advise

clients, etc., is a puffing assertion. It cannot be restrained by a private person unless it tends to pass off the employer's goods or business as that of his former employer, or exposes him to liability as an ostensible partner or causes him damage by disparaging his goods (*Cundey v. Lerwill & Pike* (1908)).

It is useful to notice the gist of the decision in *Burberry's v. J. C. Cording & Co., Ltd.* (1909), where the right to use the term "slip-on" in connection with coats was discussed. Apart from the law as to trade marks an ordinary English word is seldom protected as being distinctive of a particular trader's goods where there is no fraud or deception in the use of the term by another. An injunction will not be granted unless and until deception is proved. Apart from a trade mark no one has a monopoly right in the use of a word or name, but equally no one can use such word or name to pass off his goods as those of another to the injury of the latter. When an injunction is granted to restrain the use of a name, *it is not the name that is protected* but the trade or goodwill which will be injured by its continued use. Thus a person cannot be prevented from using a well-known name for the advertising of another class of goods (*Warwick Tyre Co., Ltd. v. Motor & General Rubber Co., Ltd.* (1909)).

Use of ordinary English word

In certain cases legal protection is extended to goods under the Merchandise Marks Act, 1887 (51 & 52 Vict., c. 28), and a person who places goods in a package or covering, e.g. a bottle (*Stone v. Burn* (1910)), to which a trade description has been applied, is deemed to have applied a trade description by any marks embossed on the bottle, even although another label is attached.

Slander of title defined

SLANDER OF TITLE. Notwithstanding the name of this class of wrong, it is not really directly related to defamation. Formerly it was most usual in matters of title to real estate, but though not very common it applies to personalty equally. It may be defined as any malicious statement made orally or in writing, injurious to anyone's title to property and causing special damage to that person.

What must
be proved

The plaintiff in prosecuting such an action must prove the publication, and further that the statement was untrue, malicious, and special damage followed. The lack of good faith or presence of malice is often difficult to prove, and where the slander of title is part of a personal defamation success is more certain in an action for libel, or if oral in an action for slander in the way of his trade or business, in which case special damage and malice are not necessarily conditions to a right of action.

What amounts
to special
damage

The following results have been held to be sufficiently damaging: that the goods, title to which has been held in question, have become unsaleable, or depreciated in value; that an intending purchaser has refused to complete or that completion has been enforced only by action in which costs were incurred by the plaintiff. The certainty of future damage has been held to be sufficient (*White v. Mellin* (1895)).

Slander of
goods defined

SLANDER OF GOODS. Slander of goods is in its effect very similar to slander of title, but it differs in that the goods themselves are disparaged and not the ownership of or title to them. Any false statement made orally or in writing, maliciously or without lawful cause, disparaging the goods of a trader and causing special damage to him is actionable. Sometimes such a wrong is called "trade libel," but the expression is even worse than slander of goods as a description of the civil wrong in question.

What must
be proved

An action for malicious statement as to goods cannot succeed unless the plaintiff can show that the statement is false, malicious, and resulted in special damage. No action lies against a trader for puffing his own goods, even although he represents them as superior to all others, disparaging such others generally. Should he make specific false statements an action may lie, but the mere fact that he expresses the opinion that his goods are superior to those of a named trader is not actionable (*Hubbock & Sons v. Wilkinson, Heywood & Clark* (1899)).

Special
damage

The special damage to be proved is actual damage

resulting from the statement, as, for instance, loss of customers who know of the statements and general loss of business is evidence of this (*Ratcliffe v. Evans* (1892)). Where a man suffers loss in his business as the "natural and probable" result of words spoken in relation to his business, e.g. that the firm has ceased to exist, although not in itself defamatory it is a trade libel, and if untrue and malicious it is actionable. As in the case of slander of title, where the words spoken extend to the person, an action of slander will lie, and in case of written words libel will be imputed.

CHAPTER XXVI

PATENTS, DESIGNS, TRADE MARKS, AND COPYRIGHT

THESE are a valuable species of incorporeal property, usually known as *choses in action*. The special advantages attached to each are too well known to need any exposition here. They may, with advantage, be considered together, since they possess many points in common and each is the creation of statute law, except copyright to a limited extent.

Origin of
patent rights

PATENTS. Patents are a species of incorporeal property granted by the Crown to the authors of new inventions, giving them the sole and exclusive right to use, exercise, and sell their inventions and to secure the profits arising therefrom for a limited period. They are so called because the grants are contained in charters, or "letters patent," that is, open letters (*literae patentes*), of which Blackstone says, "they are not sealed up, but exposed to open view, with the great seal pendent at the bottom, and are usually directed or addressed by the King to all his subjects at large."

Statute of
Monopolies,
1624

Patents are a survival of the grants of monopolies by the Crown, which grants were asserted to be a prerogative right of the Sovereign. The abuse of this prerogative caused great opposition during the reigns of Elizabeth and James I, and the opposition culminated in the passing of the Statute of Monopolies in 1624 (21 Jac. 1, c. 3). By this statute the Crown could not, henceforth, grant any trading monopoly, but an exception was made in favour of grants of privilege, for fourteen years or under, "of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor or inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state

by raising prices of commodities at home, or hurt of trade, or generally inconvenient" (sect. 6).

The principle upon which the exception was permitted has been thus stated: "The right to a patent monopoly of a useful invention is granted on the principle of a compromise or bargain between the inventor and the public. If left to the common law, the inventor would be deprived of the benefit of his invention. If he held a monopoly of it for ever, the public interest would suffer by high prices imposed by him whenever the use of his invention was valuable, and so would be deprived of the advantage of the discovery by other persons. On these grounds the bargain proceeds, by which there is given to the public the full benefit of the discovery, on a fair disclosure of it in its most beneficial shape, and in terms so plain and intelligible that it may be used without danger of useless expense, and without the necessity of further experiment, and the public, on the other hand, is restrained for a time from interfering with the gains."

The Statute of Monopolies is the origin of the present patent law. The rules governing patents and designs are, however, to be found in the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), as amended by Acts of 1914, 1919, 1928, and 1932. The Act of 1907 is now printed as amended by the various Acts passed up to 1932, and throughout this section, unless the contrary is stated, references to sections are to the consolidating reprint.

Statutes
regulating
patents

Subject-matter of Letters Patent. The subject-matter of a valid patent must be a manufacture, that is, some article of value produced by the art and skill of man. There can be no patent in a mere principle or idea. For example, supposing a person discovered that the angles of a parallelogram are equal to four right angles, that is an abstract discovery and would not be the subject of a patent.

Manufacture

The manufacture must be novel (*Badische Anilin v. Levinstein* (1887)). Moreover, it must be a new invention within the realm. "The consideration for a patent

Novelty

is the communication to the public of a process that is new" (*Patterson v. Gas Light Co.* (1877)). If an invention is once made public by any means, no subsequent patent will be granted. Where the patentee merely effected a natural and ordinary workshop alteration in a known machine the patent was held bad for want of subject-matter, the idea was not new, and there was no problem to be solved in carrying it into effect (*Lennards Perfect Skill Control Co., Ltd. v. Holloway & Sampson Novelty Co., Ltd.* (1929)).

Invention
distinguished
from
discovery

It must be carefully remembered that an invention is different from a discovery. A discovery is not the subject-matter for a patent unless it is an addition not only to knowledge, but to known inventions, and produces either a new and useful thing or result, or a new and useful mode of producing an old thing or result.

Utility

The invention must possess utility (*Badische Anilin v. Levinstein* (1887)), and in this connection the head-note to the case of *Welsbach Incandescent Gas Light Co. v. New Incandescent (Sunlight Patent) Gas Lighting Co.* (1900), tersely expresses the law upon the subject—

"A very small amount of utility is sufficient to support a patent. Utility, in patent law, does not mean abstract, or comparative, or competitive, or commercial utility; but, as applied to an invention, it means that the invention is better than the preceding knowledge of the trade as to a particular fabric, better that is in some respect though not necessarily in every respect. For instance, an invention is useful by which an article good, though not so good as one previously known, can be produced more cheaply by a different process. And an invention is useful when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before—or, in other words, an invention is patentable which offers the public a useful choice."

Not contrary
to public
policy

The invention must not, of course, be contrary to public policy, e.g. an invention which could only be used for gambling could not be the subject-matter of letters patent.

Who may Apply for a Patent? Any person, and this includes a body corporate, who is the "true and first inventor," may apply for a patent, whether he is a British subject or not. If an inventor dies before applying for a patent for his invention, application may be made by his executor or administrator at any time within six months after the death of the inventor. Two or more persons may apply for a patent, and a grant may be made to them jointly; this is so, even though all the applicants are not true and first inventors (1907 Act, sect. 1).

Joint
application

The grantee, or one of the grantees, must be "the true and first inventor." The legislature has made no attempt to define who is "the true and first inventor." The term, however, has been held to signify not only a person who would be so accounted in the popular sense of the word, but to include a person who has imported the invention of another from abroad, or the first person who has obtained a patent when the invention has been made by two or more persons simultaneously. In the case of *Plimpton v. Malcolmson* (1876), Jessel, M.R., made the following remarks: "Shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—'known' being used in that particular sense, as being part of what had been called the common or public knowledge of the country. That was the first thing. Then there was a second

True and first
inventor

thing. Suppose there were two people, actual inventors in this country, who invented the same thing simultaneously, could either be said to be the first and true inventor? It was decided that the man who first took out the patent was the first and true inventor. Then there was another point. If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still, in law, be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, without being actually kept secret, had not been made known in such a way as to become a part of the common knowledge, or of the public stock of information. Therefore, in that case also, there was a person who was legally the first and true inventor, although, in common language, he was not, because one or more people had invented it before him, but had not sufficiently disclosed it."

Effect of communication of invention to another

It must be carefully remembered that if an inventor within the realm has communicated his invention to another person, the latter cannot obtain a valid patent for it (*Marsden v. Saville Co.* (1878)), and, moreover, the communication to another, unless made under conditions implying secrecy, may amount to publication and prevent the inventor from obtaining letters patent because the novelty is destroyed.

Form of application

Specification

How to Obtain a Patent. The form of application must be lodged with the comptroller of patents, designs, and trade marks. It must be accompanied by what is called a "specification," that is, a description of the invention. Drawings, samples, specimens, etc., must be added, if necessary, to complete the description. The object of requiring a specification is to enable persons of intelligence and skill to understand the nature of the invention for which the patent is to be granted, and also to allow of a competent workman being able to produce the article for which the patent is taken out. Sometimes it is not possible for the inventor to give a complete description at the time of

making his application, although he is anxious to avoid being anticipated by any other person. He therefore gives a short description of his invention in what is known as a "provisional specification" (sect. 2). This must, however, be followed by a "complete specification," that is, a full description of the nature of the invention, and of the manner in which it is to be performed, within twelve months (or, by special leave, within a further period of one month) of the date of application, otherwise the application will be deemed to have been abandoned (sect. 5). The complete specification must normally be accepted within eighteen months from the date of the application, otherwise the application becomes void (sect. 8 (a)). The forms of application and specification for a patent are given in the Second Schedule to the Patents Rules, 1920. It should be observed that different forms are provided in different circumstances.

Provisional
specification

The lodgment of the provisional specification is a great boon to the intending patentee. Within the period of twelve or thirteen months allowed for further consideration, he may discover that his supposed invention is not new, or that it is capable of further improvement, and in either case he will save himself from any expense, beyond the sum of £1 which must be paid when the application and provisional specification are left with the comptroller. A sum of £2 is payable on an application for an extension of time for filing the complete specification. An additional sum of £3 must be paid when the complete specification is lodged, and these are the total fees payable up to the end of the fourth year from the date of application, except the sum of £1 which is now to be paid for sealing the patent.

Advantages of
provisional
specification

Where an application is accompanied by a specification purporting to be a complete specification, the comptroller may, at the request of the applicant, treat the specification as a provisional specification: (sect. 3).

The specifications are referred to an examiner, who is an officer appointed by the Board of Trade, and he reports upon the whole. In addition, the acceptance

Examiner

of the complete specification is advertised, so that any person may make an inspection of it (sects. 6, 9).

Opposition to
grant

Within two months (or with the consent of the comptroller within a further period not exceeding one month) of the date of the advertisement, notice of opposition to the grant of a patent may be given. The following are the only grounds upon which any person may oppose the grant of the patent—

Grounds for
opposition

(1) That the applicant obtained the invention from him or from a person of whom he is the legal representative; or

(2) That the invention has been published in any complete specification or in any provisional specification followed by a complete specification, deposited within fifty years next before the date of the application for the patent the grant of which is being opposed, or

(3) That the invention has been made available to the public by publication in any document (other than a British specification) published in the United Kingdom prior to the application; or

(4) That the invention has been claimed in any complete specification which though not published at the date of the application, was deposited pursuant to such patent,

(5) That the nature of the invention or the manner in which it is to be performed are insufficiently or unfairly defined in the complete specification.

(6) That the complete specification describes an invention other than that described in the provisional specification.

(7) That in the case of an application under sect. 91 (as to International and Colonial arrangements) the specification describes or claims an invention other than that for which protection has been applied in a foreign state or British possession, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the application in the foreign state, or British possession, and the leaving of the application in the United Kingdom (sect. 11).

An opposition to a patent is not necessarily admissible because it is not frivolous, vexatious, or black-mailing (*In re Clavel's Application* (1928)).

If the examiner reports favourably, and there is no opposition, or if the opposition is unsuccessful, a patent will be granted to the applicant, or in case of a joint application, to the applicants jointly, authenticated by the seal of the Patent Office (sect. 12). But the comptroller may refuse a grant if he is of opinion that the invention is so contrary to well-established natural laws that the application is frivolous or that its use would be contrary to law or morality (sect. 75). The patent is dated as of the day of the application (sect. 13). No proceedings, however, can be taken in respect of an alleged infringement of a patent before the acceptance of the complete specification.

Grant of
patent

The applicant may use and publish his invention at any time after the acceptance of his application, without prejudicing his rights in any way. He obtains what is called "provisional protection," which has the effect of protecting him against the consequences of his own publication (sect. 4). It is provided that the rights of an inventor shall not be affected by the exhibiting of his invention at an Industrial or an International exhibition, certified as such by the Board of Trade, or by reading a paper by him before a learned society or the publication of the paper in the society's transactions, prior to his application for a patent, upon his giving notice to the comptroller of his intention to do so, provided that the application itself is not delayed beyond six months from the date of the opening of the exhibition (sect. 45).

Provisional
protection

On certain grounds, mainly those of fraud, a patent, although duly granted, may be revoked. Further, it may be revoked within twelve months of sealing the patent, on any ground upon which the granting of the patent might have been opposed (sect. 26).

Revocation
of patent

Patents are generally taken out through a patent agent, and it is the better plan for an inventor to rely upon such an agent rather than to proceed by himself.

Patent agents

The technicalities connected with the application, etc., are of such a nature that only an expert can hope to battle successfully with them. A patent agent must be a person registered under the Act. Any person who advertises himself as a patent agent, without being duly registered under the Act, is guilty of a punishable offence.

Duration of Patent. The patent is dated with the date of the application and lasts for sixteen years (sect. 17). But the extension beyond four years is dependent upon the payment of certain fees. A scale was fixed by the Act of 1907, but this has now been altered, and, in addition to the £1 and £3 already mentioned, the payments are fixed as follows--

	On notice of desire to have the patent sealed		£1	
Renewal fees	For renewal beyond four years, in respect of each succeeding year and before the commencement of the year --			
	For the 5th year	£5	For the 11th year	£11
	„ 6th „	£6	„ 12th „	£12
	„ 7th „	£7	„ 13th „	£13
	„ 8th „	£8	„ 14th „	£14
	„ 9th „	£9	„ 15th „	£15
	„ 10th „	£10	„ 16th „	£16

Failure to
pay renewal
fees

By failing to keep up these additional payments, a patentee can allow his patent to lapse. His decision will most certainly be based upon the prospects of success attending his invention. The time for payment of the renewal fee may be extended up to three months on payment of a further extension fee, and even after this in exceptional circumstances a lapsed patent will be restored if the failure to pay the fees was due to inadvertence.

Extension
beyond six-
teen years

An inventor may sometimes obtain an extension of time for an additional five years, and in special cases ten years (sect. 18). For this purpose a petition to the High Court of Justice, in accordance with prescribed rules, is necessary. The principal grounds upon which the prolongation is allowed are the merit of the invention and the inadequate remuneration. Each case will depend upon its own peculiar merits, and the fullest information is required before

an application for an extended grant will be entertained (*In re Lake* (1891); *In re Henderson* (1901); *In re Wuterich* (1903)). In the case of *In re Currie and Timmis' Patent* (1898), where it appeared that an invention was of very considerable merit, that there had been great difficulties in introducing it, and that the petitioner had incurred losses in his efforts to do so, an extension of ten years was recommended. No extension will be allowed as a rule where an invention has not been used during the term of the original grant of the patent (*In re Southby* (1891)).

The Register. A register is kept at the Patent Office, and in it are entered all particulars as to patents, the names and addresses of the grantees, notifications of assignments and transmissions, of licences, of amendments, extensions, and revocations, and of such other matters as affect their validity and ownership. The register is open to public inspection during official hours and certified copies of any entries can be obtained (sect. 28).

Contents of
register

Rights of Patentee. The patentee is entitled, during the time that his patent is in force, to the sole rights and profits arising from the invention which he has patented. In any case of infringement there is a remedy by an action for an injunction to restrain the infringer from further interference with the rights of the patentee, and also for damages. In lieu of damages, but not in addition thereto, the patentee may claim an account of profits in respect of such infringement (*De Vitre v. Betts* (1871)).

Infringement

Damages or
account of
profits

It is an infringement of the rights of the patentee in this country to deal with the subject-matter of the invention which has been patented, even though the article itself has been made abroad (*British Motor Syndicate v. Taylor* (1901)). The importation, even for the purpose of exportation, of an infringing article would amount to an infringement.

It is an offence punishable with a fine not exceeding £5 for any person falsely to represent that an article is patented by him (sect. 89).

Power of
patentee to
assign

Assignment. A patentee may assign his patent absolutely, or may limit it to any part of the United Kingdom or the Isle of Man. Although it is not necessary that the assignment shall be made by deed, it is the common practice to use a deed not only for an assignment, but also for a licence.

Where an applicant for a patent has agreed in writing to assign the patent when granted, the patent may be granted to the assignee (sect. 12).

Permission
to work
by licence

Licences. A licence by a patentee does not transfer rights; its object is to give permission to a person to do what he would otherwise be unable to do on account of the patent. Thus it differs materially from an assignment of the patent whereby the rights of the patentee are transferred to the assignee. A licence may be granted to manufacture, to use, or to sell the invention, or it may be granted for all those purposes. It may be for the term of the patent or for any shorter period, and it may be limited as to area or extend over the whole of the United Kingdom.

In the case of *British Mutoscope & Biograph Co. v. Homer* (1901), it was held that the right of making and using a patented chattel, and the licensing of others to use it, is an incorporeal right distinct from the right of property in the chattel itself. Therefore, although a landlord, under a distress for rent, may seize and sell the chattel if it happens to be on the demised premises, the person purchasing it can be restrained by injunction from using the chattel.

Abuse of Monopoly Rights. Any person interested may, after the expiration of three years from the date of sealing, apply to the Comptroller alleging that there has been an abuse of the monopoly rights under a patent and asking for relief. The monopoly rights are deemed to have been abused in the following circumstances—

Failure to
work patent

(1) If the patent is not being worked within the United Kingdom on a commercial scale and no satisfactory reason can be given for such non-working.

Prevention of
working by
importation
from abroad

(2) If the working within the United Kingdom on a commercial scale is being prevented or hindered by the

importation from abroad of the patented article by the patentee or by persons against whom he has not taken any proceedings for infringement.

(3) If the demand for the patented article in the United Kingdom is not being met to an adequate extent and on reasonable terms.

Failure to satisfy demand

(4) If by reason of the refusal of the patentee to grant a licence on reasonable terms the trade of any person trading in the United Kingdom or the establishment of any new trade in the United Kingdom is prejudiced and it is in the interest of the public that a licence should be granted.

Prejudice to trade by refusal to grant licence

Public interest is to be construed in its widest sense; it does not include only the purchasing public (*In re Brownie Wireless Co. of Great Britain, Ltd.* (1929)).

(5) If any trade in the United Kingdom is unfairly prejudiced by the conditions attached by the patentee to the purchase, hire, licence or use of the patented article.

Prejudice to trade by conditions attached to patent

(6) If it is shown that the existence of the patent, being a patent for an invention relating to a process involving the use of materials not protected by the patent or for an invention relating to a substance produced by such process, has been used by the patentee so as unfairly to prejudice in the United Kingdom the manufacture, use, or sale of any such materials (sect. 27).

On proof to the satisfaction of the Comptroller that there has been an abuse of monopoly rights he may--

Remedies for abuse

(1) Order the patent to be endorsed with the words "licences of right," or

Licences of right

(2) Order the grant to the applicant of a licence on such terms as he may think expedient, or

Grant of licence

(3) Order the grant to the applicant or any other person or to the applicant and any other person of an exclusive licence on such terms as he thinks just, if they are able and willing to provide the capital which he is satisfied is necessary for the proper working of the patent.

Grant of licence to person finding capital

(4) Order the grant of licence to the applicant on

such terms as he thinks expedient if satisfied that monopoly rights are infringed in circumstances mentioned in (6) above.

Revocation of patent

(5) Order the patent to be revoked forthwith or after such reasonable interval as may be specified.

Refusal of order

(6) Make an order refusing the application and dispose of any question of costs as he thinks just (sect. 27).

All orders of the Comptroller in this matter are subject to appeal to the High Court.

Effect of endorsement

Licences of Right. Reference has already been made to the endorsement of a patent with the words "licences of right." When a patent is endorsed "licences of right" any person becomes entitled as of right to a licence under the patent upon such terms as, in default of agreement, may be settled by the Comptroller.

Settlement of terms of licence

In settling the terms the Comptroller has to endeavour to secure the widest possible user of the invention and at the same time the maximum advantage to the patentee consistent with the patent being worked at a profit by the licensee. He must also endeavour to secure equality of advantage among the several licensees.

Endorsement at request of patentee

The Comptroller must cause the words "licences of right" to be endorsed on a patent at any time after the sealing on the request of the patentee (sect. 24).

Endorsement or abuse of monopoly rights

Where a patent is endorsed "licences of right" under the powers of the Comptroller, in case of an abuse of monopoly rights every existing licensee obtains power to apply to the Comptroller for an order entitling him to surrender his licence in exchange for one settled by the Comptroller (sect. 24).

Invention which may be used in service of Crown

Rights of the Crown. The Crown has, in general, no greater right to use an invention which has been patented than any other person. But it is, nevertheless, specially provided that certain terms may be imposed upon the patentee when it appears that the invention is one which may be used in the service of the Crown, and it is further provided that the Crown has the right of acquiring and keeping secret inventions of a naval or military character.

International and Colonial Arrangements. The Crown may make any arrangements with a foreign state or British possession for mutual protection of inventions, designs, or trade marks, and if an Order in Council to such effect is in force, any person who has applied for protection for any invention, design, or trade mark in any such state is entitled to protection in this country, and the patent, or the registration of the trade mark, has the same date as the date of application in such foreign state or possession. The application must be made, in the case of a patent, within twelve months, and in the case of a trade mark, within six months, from the date of the application for protection in the foreign state or possession (1907 Act, sect. 91; 1914 Act, sect. 1; 1919 Act, sect. 20).

DESIGNS. A design means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device (sect. 93). Definition of design

By sect. 49 of the Patents and Designs Act, the Comptroller may, on application being made to him in the prescribed form, register in the Register of Designs at the Patent Office any new or original design not previously published in the United Kingdom. The conditions as to the mode of application and the classification of goods for the purpose of the registration of designs relating thereto are dealt with in the Designs Rules, 1920. The Comptroller must grant a certificate of registration to the proprietor of the design when registered (sect. 51). The Comptroller may refuse to register any design, but any person aggrieved by such refusal may appeal to the Appeal Tribunal (sect. 49 (3)). Registration

When a design is registered the proprietor has copyright in the design for five years from the date of registration. The period may be extended for two further periods of five years if application is made in Refusal to register
Effect of registration

the prescribed manner before the expiration of the current period (sect. 53). The Copyright Act, 1911, does not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process (1911 Act, sect. 22, and see *Pyram, Ltd. v. Models (Leicester), Ltd.* (1930), where the effect of the two Acts is explained).

A registered design with modifications may be registered, but the period of copyright conferred by the registration of the original design may not in this way be extended beyond the period of copyright in the original design (section 50).

TRADE MARKS. A trade mark may be defined as a particular mark, stamp, or device, affixed or attached to manufactured goods, indicating to the public generally that the goods have been manufactured or otherwise dealt with by the person or persons who have affixed or attached the mark. In the words of Kay, J. (*In re Australian Wine Importers* (1889)): "A trade mark means the mark under which a particular individual trades, and which indicates the goods to be his goods—either goods manufactured by him, or goods selected by him, or goods which, in some way or other, pass through his hands in the course of trade. It is a mode of distinguishing goods which have been, in some way or other, dealt with by A. B., the person who owns the trade mark."

At common law there was no property in a trade mark. But where a person had long been in the habit of making use of a particular mark or name, he could prevent any other person from fraudulently making use of the same or a similar mark or name to pass off the latter's goods as though they were the goods of the former (see page 463, *ante*).

Registration was first established by the Trade Marks Registration Act, 1875. This Act, together with various amending Acts, was repealed, and the law as to trade marks consolidated and amended by the Trade

What is a
trade mark

Passing off

Statutes
governing
trade marks

Marks Act, 1905 (5 Edw. 7, c. 15), and the Trade Marks Act, 1919 (9 & 10 Geo. 5, c. 79), and the rules made thereunder by the Board of Trade.

Validity of Trade Marks. There are two classes of registration of trade marks. By sect. 1 of the Trade Marks Act, 1919, the register of trade marks was divided into two parts. Part A consists of all trade marks which are registered under the 1905 Act, while Part B consists of all trade marks registered under the 1919 Act. The distinction between the marks in Part A and Part B is that those in Part A are subjected to a stricter test as to their distinctiveness and greater protection is afforded them in case of infringement. Further, to be registered under Part B two years user is essential.

Registration
in Part A and
Part B

A trade mark for registration in Part A of the register must consist of or contain one at least of the following essential particulars (Act of 1905, sect. 9) —

What trade
mark under
Part A must
consist of

(a) The name of a company, individual, or firm represented in a special or particular manner.

(b) The signature of the applicant for registration or some predecessor in his business.

(c) An invented word or invented words.

(d) A word or words having no direct reference to the character or the quality of the goods, and not being according to its ordinary signification a geographical name or a surname.

(e) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs, (a), (b), (c), and (d), shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

The majority of the cases upon the validity of a name, etc., as the subject of a trade mark, have turned upon the third and fourth of these particulars. For example, in the case of *In re "Unceda" Trade Mark* (1902), it was held that the word "unceda" was merely a mis-spelt combination of three English words, and was therefore not an invented word; moreover, it was descriptive of the quality or character of

the goods to which it was attached. On two grounds, therefore, the word was incapable of registration as a trade mark.

No word which is the only practicable name or description of any single chemical element or single chemical compound, as distinguished from a mixture, can be registered as a trade mark, and any such word on the register may, notwithstanding, be removed by the court from the register on the application of any person aggrieved.

This provision does not apply, however, where the mark is used to denote only the proprietor's brand or make of such substance, as distinguished from the substance as made by others and in association with a suitable and practicable name open to the public use.

Where in the case of an article or substance manufactured under a patent, a word trade mark is the name or only practicable name of the article or substance so manufactured, all rights to the exclusive use of such trade mark whether under the common law or by registration, cease upon the expiration or determination of the patent, and thereafter such word is not deemed a distinctive mark, and may be removed by the court from the register on the application of any person aggrieved (1919 Act, sect. 6).

Trade marks
which cannot
be registered

Registration
under Part B

The Act of 1905 requires that a trade mark shall be "adapted to distinguish the goods"; the Act of 1919 enables a trade mark to be registered in Part B if it is "capable of distinguishing the goods of the applicant." This covers a greater number of cases than the words used in the earlier Act. Further, for the purpose of registration under Part B a mark must have been *bona fide* used in the United Kingdom upon or in connection with goods for not less than two years, for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, selection, certification, dealing with or offering for sale.

A mark may be registered in Part B notwithstanding any registration in Part A by the same proprietor of the same mark.

Registration. Registration is effected by application, in the prescribed form, to the registrar at the Patent Office. The application must be accompanied by five representations of the trade mark, and a statement of the particular class of goods in connection with which the applicant desires that it should be registered. The application must be advertised by the registrar, and any person may within one month give notice of opposition to the registration, either on the ground that the trade mark is not a proper subject for registration, or that it so closely resembles a mark already registered that it is calculated to deceive. If the applicant does not, after notice of the opposition, proceed with his claim for registration, he will be presumed to have abandoned it. The registrar may refuse to register a trade mark if its use would, in his opinion, be contrary to law or morality.

How effected

Just as in the case of patents, it is advisable that a person who is desirous of registering a trade mark should secure the services of a person who is an expert in such matters. There are so many particular points to observe, and so many pitfalls to avoid, that it is extremely unwise to risk failure by proceeding on his own account.

As soon as a trade mark is registered, the proprietor has a *prima facie* right to its exclusive use. The extent of the protection afforded him, however, is greater in the case of registration under Part A than in the case of registration under Part B. Sect. 4 of the 1919 Act provides that no injunction, interdict, or other relief shall be granted to the owner of the trade mark in respect of registration under Part B if the defendant establishes to the satisfaction of the court that the user complained of is not calculated to deceive or to lead to the belief that the goods the subject of such user were goods manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark. Further the provision of the Act of 1905 that registration is conclusive after seven years does not apply to registration in Part B.

Effect of registration

Renewal of
registration

Registration is valid for fourteen years from the date of the application, and can be renewed every fourteen years. The fees payable upon application and registration are fixed by the Board of Trade.

Register kept
at Patent
Office

The register of trade marks is kept at the Patent Office, and contains particulars similar to those entered in the register of patents.

Assignment. A registered trade mark can be assigned, but its assignment can take place only together with the assignment of the goodwill of the business with which the trade mark is connected (1905 Act, sect. 22). Apart from the goodwill it has no existence, so that if the goodwill is determined the trade mark disappears with it. When a series of trade marks have been registered, they are assignable only as a whole.

Merchandise Marks. The Merchandise Marks Acts, 1887 to 1926, deal with criminal offences in relation to trade marks. The principal Act is the Merchandise Marks Act, 1887 (50 & 51 Vict., c. 28); it was amended in 1891, 1911, and 1926.

False trade
mark or trade
description

It is a criminal offence, punishable by fine or imprisonment or both, for any person to forge or falsely apply a registered trade mark or to apply a false trade description, to goods.

Time for
prosecution

Any prosecution under the Act must be commenced within three years of the date when the offence was committed or within one year of the offence being discovered, whichever is the earliest.

By the Merchandise Marks Act, 1926 (16 & 17 Geo. 5, c. 63), if the goods of a foreign manufacturer are imported into this country, and bear the name or mark of any manufacturer, dealer, or trader in the United Kingdom, or the name of any place in the United Kingdom, they must also bear a clear indication of the name of the country in which they have been produced. It is an offence to sell, expose for sale, or to distribute as a method of advertising goods of another kind, any goods infringing the above requirement.

COPYRIGHT. The law of copyright is governed by the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), which

repealed all existing statutes, and amended and consolidated the law upon the subject.

For the purposes of the Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and includes the sole right --

Copyright defined

(a) To produce, reproduce, perform in public, or publish any translation of the work;

(b) In the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(c) In the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) In the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered. It also includes the sole right to authorise the above acts.

In **Harms, Ltd. & Chappell & Co. v. Martans Club** (1926), it was held that performance to members of a club at which entertainment fifty guests were present was a performance in public, and so constituted an infringement.

Existence of Rights. As to the rights which may be enjoyed as far as Imperial Copyright is concerned, it is provided that it shall subsist throughout the parts of His Majesty's dominions, to which the Act extends in every original literary, dramatic, musical, and artistic work, if—

(a) In the case of a published work the work was first published within such parts of His Majesty's dominions as aforesaid; and

Application of copyright rules

(b) In the case of an unpublished work, the author was at the date of the making of the work a British

subject or resident within such parts of His Majesty's dominions as aforesaid ;

but in no other works, except so far as the protection conferred by the Act is extended by Orders in Council thereunder relating to self-governing Dominions to which the Act does not extend and to foreign countries.

Publication. Publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art are not deemed to be the publication of such works.

Fifty years
after author's
death

Duration of Copyright. Generally speaking, copyright subsists for the life of the author and a period of fifty years after his death, in photographs for fifty years from the making of the negative, but at any time after the expiration of twenty-five years, or, in the case of a work in which copyright subsisted before the passing of the Copyright Act, thirty years from the death of the author of a published work, copyright in the work is not deemed to be infringed by the reproduction of the work for sale, if the person so reproducing proves that he has given notice in writing of his intention to reproduce the work, and that he has paid to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, calculated at the rate of 10 per cent on the price at which he publishes the work. The Board of Trade are empowered to make regulations as to the manner in which notices are to be given, and in which royalties are to be paid.

Notice of
intention to
reproduce

Refusal to
republish or
allow republica-
tion after
author's death

Compulsory Licences. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish, or to allow the republication of the work, or the performance in public of the

work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work, or perform the work in public, on such terms and subject to such conditions as the Judicial Committee of the Privy Council think fit.

Ownership of Copyright. In most cases the author of a work, and, as regards a photograph, the owner of the original negative, is regarded as the first owner of the copyright therein; but where the plate or original of an engraving, photograph, or portrait, was ordered by some other person and was made for valuable consideration in pursuance of that order, the person who gave such order will be the first owner of the copyright, in the absence of any agreement to the contrary; and where the author of a work was in the employment of some other person under a contract of service or apprenticeship, and the work was made in the course of his employment by that person, the person by whom the author was employed will, in the absence of any agreement to the contrary, be the first owner of the copyright.

In **Cummins v. Bond** (1926), the court held that the copyright in a script written by a medium under the influence, as she declared, of a psychic agent, vested in the medium as the first true author.

Assignment. The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations as to any particular country, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant will be valid unless it is in writing and signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent. Copyright is personal property, and it is transferable by an assignment in writing. No deed is necessary to carry out the transfer.

Subject-matter of Copyright. In order to show more clearly what original productions are the subject-matter of copyright, it is necessary to give a more

Author

Work ordered
by another

Author in
employment
of another

Formalities of
assignment

Literary work

detailed explanation of the expression "Literary, dramatic, musical, and artistic work." A literary work includes any book, newspaper, magazine, periodical work, map, chart, plan and table, lecture, address, speech, and sermon. It is unnecessary to give in detail the exact works to which copyright law extends, as that would involve the citation of a large number of decided cases. Reference may, however, be made to the case of *Anderson & Co., Ltd. v. Lieber Code Co.* (1917), in which it was held that the term "original literary work" would cover a code of made-up words considered suitable for cabling purposes, even though the same were entirely meaningless. Even a verbatim report of a speech may be copyright (**Walter (The Times) v. Lane** (1900)). That which is protected is the *form* in which ideas are presented. There can be no copyright in the ideas themselves, apart from the form in which they are published. The test is whether skill has been used in the assembly of material. Thus there can be copyright in a volume of selections, or in an anthology of non-copyright poems.

Dramatic work

A dramatic work includes any tragedy, comedy, play, opera, or farce, piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production, or production by any process analogous to cinematography, where the arrangement or acting form, or the combination of incidents represented gives the work an original character.

Musical work

The Act does not define "musical work," but by sect. 3 of the Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), it is defined as "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced." By the last mentioned Act a court of summary jurisdiction may, on the application of the owner, order any pirated copies of a musical work to be seized by a constable without warrant and to be brought before the court, which may order them to be destroyed or delivered up to the owner. The

Musical Copyright Act, 1906 (6 Edw. 7, c. 36) provides a penalty for being in possession for the purpose of sale of pirated music or of plates for the purpose of printing pirated music, and gives to the police a right of entry under a search warrant for executing the Act.

An artistic work includes works of painting, drawing, sculpture (including casts and models), and artistic craftsmanship; any building or structure having an artistic character or design, or any model therefor, so far as such character or design is concerned, but not including any process or method of construction; engraving, etching, lithograph, woodcut, and print; and photographs and any work produced by any process analogous to photography. Artistic work

By the Copyright Act, 1911, the protection of copyright is conferred, subject to special conditions, for which the Act should be consulted, upon records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced; and it is provided that it will not be an infringement of copyright in any musical work to make such records, etc., on complying with certain stipulations laid down as to paying royalties to the owner of the copyright in the original piece. It is an offence under the Dramatic and Musical Performers' Protection Act, 1925 (15 & 16 Geo. 5, c. 46), to make for the purposes of trade any record directly or indirectly from the performance of any dramatic or musical work without the consent in writing of the performers. It is similarly an offence to offer such record for sale or use it for a public performance. Sounds mechanically reproduced

Infringement of Copyright. The Act states that copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the same, does anything the sole right to do which is by the Act conferred on the owner of the copyright. It then goes on to whittle down this broad statement by introducing a large number of exceptions. It is impossible, through want of space, to attempt to set them out here, and the reader must refer to the Act for a complete list What amounts to infringement

of them. It cannot be said, however, that the law has been reduced to a condition of certainty as far as infringement is concerned. It must always remain a matter of opinion. There are plenty of cases upon which there could not possibly be any doubt in the minds of unprejudiced persons. But it is also very well known that there are ingenious plagiarisms committed over and over again as to which it would be hopeless to expect a unanimous verdict. Very often the only evidence of infringement is the repetition of errors occurring in the original.

Civil

Remedies for Infringement of Copyright. There is a choice of remedies open to the owner of copyright in case of an infringement of the same. If he proceeds civilly, he is entitled to damages, an injunction, and the delivery up to him of all offending copies and plates. He may also claim an account and payment of profits. Any action in respect of infringement must be brought within three years of the infringement. It is also possible for the injured party to proceed summarily against the offender in a police court, and the justices or the magistrate before whom the case is heard have power to impose a fine varying from £2 to £50, or to send the offender to prison for a term up to two months, according to the nature of the offence.

Criminal

There are special provisions as to pirated musical works and also as to artistic works of all kinds which are dealt with in a most voluminous fashion in the Act of 1911. For full particulars as to these the statute itself must be consulted.

Prohibition of
importation of
copies of
certain works

Imported Copies. Copies made out of the United Kingdom of any work in which copyright subsists which, if made in the United Kingdom, would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise that he is desirous that such copies should not be imported into the United Kingdom, are not to be so imported, and they are to be deemed to be included in the table of prohibitions and restrictions contained in sect. 42 of

the Customs Consolidation Act, 1876 (39 & 40 Vict., c. 36). This is provided for by sect. 14 of the Act of 1911. The Commissioners of Customs and Excise are empowered to make regulations as to carrying this provision into force and to satisfy themselves that the books of which notice is given are such as are really to be prohibited in accordance with the law.

Delivery of Books to Libraries. The publisher of every book published in the United Kingdom must within one month after the publication send a copy to the British Museum, and, if required to do so within a year after publication, must also send copies to the Bodleian Library, Oxford; the University Library, Cambridge; the Library of the Faculty of Advocates at Edinburgh; the Library of Trinity College, Dublin; and, with some possible exceptions, the National Library of Wales. The penalty for non-observance of this requirement is a fine not exceeding £5 and the value of the book. In this connection the expression "book" includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, chart, and table separately published, but does not include any second or subsequent edition of a book, unless such edition contain additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto. In the case of an encyclopaedia, newspaper, review, magazine, or work published in a series of books or parts, it is not necessary to make a separate claim for each number or part, but a single claim for the whole work will suffice. By the Copyright (British Museum) Act, 1915 (5 & 6 Geo. 5, c. 38), provision is made for making regulations excluding certain books from the requirements of the 1911 Act with regard to copies being sent to the British Museum. Regulations under the Act excluding price lists, prospectuses, etc., have been made.

International Copyright. As a result of the Berne Convention of 1885 the International Copyright Act, 1886, was passed giving effect to its provisions. The convention was subsequently revised and the effect of

these revisions was included in the Copyright Act, 1911, which repealed the Act of 1886. By sect. 29 of the 1911 Act it is provided—

“His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

(a) To works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's Dominions, to which the Act extends;

(b) To literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects,

(c) In respect of residence in a foreign country to which the order relates, in like manner as if such residence were residence in the parts of His Majesty's Dominions to which this Act extends.”

Where such an Order in Council is made, the copyright law in general is extended to that country or those countries to which the Order refers, subject to such conditions as it is deemed necessary to make. Orders have been made under the section applying the Act to various countries among which may be mentioned: Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Spain, Switzerland, and the United States of America.

CHAPTER XXVII

SHIPPING

IN the chapters on Carriage and Insurance reference has been made to several matters which might have been dealt with in a chapter under the present heading. Such an alteration in order would, however, have led to certain disadvantages, and it is proposed, therefore, in the present chapter, to touch upon certain points which are of importance, but which could not find a convenient place in the foregoing pages.

The rules of law affecting British ships, which differ in many important particulars from the ordinary rules of law, have been laid down by statutes passed at various times. The whole of the statute law was codified by the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), which has been subsequently amended by several short Acts, the whole being cited as the Merchant Shipping Acts, 1894 to 1928.

British Ship. In order to constitute a vessel a British ship, it must be owned exclusively by British subjects, natural born or naturalised, or by a corporation established under and subject to the laws of some part of the British dominions, and having its principal place of business within the British dominions. An alien is expressly excluded from the privilege of holding property in a British ship (British Nationality and Status of Aliens Act, 1914, (4 & 5 Geo. 5, c. 17), sect. 17). As to a British company which is composed entirely of alien shareholders, see p. 179, *ante*.

What is a
British ship?

In addition, the ship must be registered as a British ship. The registration is dispensed with, under certain conditions, in the case of vessels of small tonnage. It may be effected, on the application of the owner or his agent, at any port within the British dominions, and that port is then known as the port of registry.

Registration

Many preliminaries must be fulfilled before an application for registration can be made. The name of the

Preliminaries
to registration

vessel must be painted or marked on the bows, and her name and port of registry on the stern. The official number and tonnage must be cut on her main beam. Her draught must be indicated by letters or figures on the stern post. A "certificate of survey" must be handed in, such certificate containing the information necessary to identify the ship, and, on the first registration, a "builder's certificate," giving additional particulars. All these requirements are set forth in detail in sects. 7-10 of the Act of 1894. The owner must also make a declaration to the effect that there are no reasons existing, so far as he knows, for dis-entitling the vessel to be registered as a British ship. The name of the master must also be stated.

Certificate of
registry

All these particulars are entered into what is called the "register book," and the registrar, on the completion of the registration, grants a certificate of registry to the applicant. Any change of ownership must be endorsed upon the certificate as soon as possible after such change.

Effect of
registration

Unless a vessel is registered as a British ship she cannot claim any of the privileges and advantages attaching to such a status, and cannot use the British flag, under penalty of forfeiture.

A ship includes almost every type of sea-going vessel, including lighters and barges used in tidal waters (Merchant Shipping Act, 1921 (11 & 12 Geo. 5, c. 28), sect. 1).

Ownership of a British Ship. The following are the provisions as to ownership (1894 Act, sect. 5)—

Sixty four
shares

(1) The property in a ship shall be divided into sixty-four shares.

Not more than
sixty-four
entitled to be
registered

(2) Not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons, or of any company represented by or claiming under or through any registered owner or joint owner.

Owner of
fractional
part of share

(3) No person shall be entitled to be registered as owner of a fractional part of a share in a ship, but any

number of persons, not exceeding five, may be registered as joint owners of a ship or any share or shares therein

(4) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein, in respect of which they are registered. Joint owners

(5) A corporation may be registered as owner by its corporate name. Corporation

No notice of any trust, express, implied, or constructive, may be entered in the register book, or received by the registrar. The registered owner of the ship or of a share therein has absolute power to deal with his interest, or to dispose of it as provided by the Act. Notice of trust cannot be entered in register

Management. When a ship is owned by several persons, the management is generally left to an individual who is known as the "ship's husband." He has complete control over the use and employment of the ship. If this course is not adopted, the will of the majority of the part owners governs the use and employment, though, before any voyage can be undertaken to which the minority object, an indemnity must be given by the former to the latter to the extent of the latter's interest. If, then, the ship is lost, the minority are secured, but if she returns in safety they are not entitled to any share in the profits of the voyage. To avoid difficulties of this kind, it is the common practice for joint owners, when no ship's husband is appointed, to agree expressly upon the terms by which they will consent to be bound. Ship's husband

The management of the ship, when at sea, will be noticed later.

Transfers and Mortgages. The owners of a ship or of any share therein may dispose of the same by way of sale or mortgage. Each of these transactions is subject to special rules. Power of majority to bind minority

A sale can be effected only by a document which is inappropriately called a bill of sale, since the Bills of Sale Act, 1878, does not apply to it. The form is given Transfer by "bill of sale"

in the Act of 1894 and must be adhered to. It has to be under seal and must contain *inter alia* a description of the ship sufficient to identify it. There is no such thing as a delivery of a ship, and there is no market overt for them (*Hooper v. Gumm* (1866)). The bill of sale and the declaration are presented to the registrar, who records the transaction in the register book, and endorses the bill of sale with a statement acknowledging the registration. The transferee cannot be registered as owner until he has made a "declaration of transfer" containing a statement of his qualifications to own a British ship and a declaration that no unqualified person is entitled as owner to any interest in the ship.

Transfer by
operation of
law

Position of
trustee or
personal
representa-
tives

Order for
sale of ship

If the transfer takes place by operation of law, that is, through the death or bankruptcy of the owner, the executor, administrator, or trustee, cannot be entered on the register as a transferee, unless he is in other respects qualified to be the owner of a British ship.

At the request of an unqualified person, who is entitled as executor, administrator, or trustee, the court may order the ship or the share in it to be sold within four weeks of the transmission of the interest of the deceased or the bankrupt.

Mortgage of
ship

There is a specified form in which a mortgage of a ship must be made, and an entry of the fact must be inserted in the register book. Since it is provided by sect. 34 of the Act of 1894 that a mortgagee shall not be deemed to be the owner of the ship or of a share thereof by reason simply of the mortgage, no declaration is necessary on the part of the mortgagee such as that required by a transferee. Although the mortgagee does not obtain the ownership, he has nevertheless a statutory power of sale on the non-payment of the debt.

Ship's Papers. The papers carried by a ship depend upon the nationality of the ship. Among the papers carried by a British ship are the following—

Register

(1) *The Register*. That is the Certificate of Registry to which reference has already been made. It contains the name and chief particulars of the ship.

(2) *The Articles*. That is the agreement with the seamen showing the terms upon which they are engaged for the voyage. Articles

(3) *The Charter-party and Bills of Lading*. Charter-party and bills of lading

(4) *Invoices* relating to the cargo. Invoices

(5) *The Bill of Health*. This is a certificate that the vessel is free from infectious disease. Bill of health

(6) *The Official Log Book*, which contains all matters relating to the crew, collisions, etc. It has to be signed by the master and the mate or some other member of the crew. Log book

The Master. The master must be a properly qualified person, according to sects. 92-93 of the Merchant Shipping Act, 1894, as amended by the Act of 1906. Qualifications

His general duties include the provision of a competent crew and adequate equipment, due navigation and proper management of the ship, and every care of the interests of the owners. He must keep an official log and take charge of the ship's papers, all of which must be presented for inspection on a proper demand being made. He is invested with special disciplinary powers over all persons on board. His duties, as far as the cargo is concerned, are to take it in as quickly as possible, to store it properly, and to sign the bills of lading for the goods which he has received on board. Duties

Owing to the "perils of the deep," however, the master of a ship has enjoyed, from the earliest times, very special powers as to both the ship and the cargo. These powers must be used with prudence and for the benefit of all concerned. Thus, in special circumstances he may tranship the goods, that is, transfer them to another ship, and although there is, in so doing, a technical breach of the contract to carry, the shipowner will not, on account of the transhipment, provided the goods arrive at their destination, be deprived of the full freight. Again, when money cannot otherwise be raised for carrying out necessary repairs to the ship, the master can sell the cargo as a last resource, though the shipowner will be compelled to indemnify the owners of the goods. Another peculiar right is that of jettison, Special powers

Transhipment

Sale

Jettison

that is, the throwing of goods overboard for the purpose of saving the ship, by lightening her during a storm.

Bottomry and Respondentia. These are bonds whereby the ship, freight, or cargo are charged with or made liable (or as it is called "hypothecated") for the payment of money borrowed for the necessary requirements of a ship while on a voyage. They may be in any form but are usually made by deed and signed by the master, binding him to repay the advances made within a limited time of the ship's safe arrival in port. Where the cargo alone is hypothecated, the bond is strictly called a respondentia bond, although in practice the term "bottomry bond" is applied, whether the vessel itself or only the cargo forms the security.

Rights of
bond holder

The peculiar feature of a bottomry bond (as also of a respondentia bond), is that the repayment is dependent upon the safe arrival of the ship at her destination; in fact, the bond is not a good one if there is a covenant to repay the money in any event (*The Haabet* (1899)). As the risk is great the interest charged is proportionately high. On the safe arrival of the ship at her destination, the holder of the bond has a claim which is preferred to every other, except wages earned subsequently to the execution of the bond, and salvage.

Priority
among
bond holders

If there are several bottomry bonds, the last takes priority over all the rest, and the first is last. The reason for this rule is that it was the money expended upon the ship raised by the last bond which has made the successful termination of the voyage possible, and that without it all prior bond-holders would not have been entitled to anything.

When
bottomry
resorted to

This power of hypothecation is so formidable that it cannot be resorted to until every other chance of raising money has failed, and communication with the ship-owner is impossible, or so difficult as to be likely to prejudice the safety of the ship by the delay that will be occasioned. The amount borrowed must not exceed the sum required for the actual necessities of the ship. The lenders must also exercise care in making the loan,

and gather from all the circumstances of the case what are the powers of the master.

Average. It would be unfair that losses arising out of any sacrifice made for the general safety of the ship should fall exclusively upon the owner of the goods sacrificed, or upon the shipowner in the case of cutting away a mast in time of extreme peril. "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionately by all who are interested" (*Birkley v. Presgrave* (1801)). The term "general average" is applied to the apportionment of the loss which takes place. "General average . . . is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison, but its principle applies, and has been applied, to all cases of voluntary sacrifice for the benefit of all, that is, if properly made" (*Anderson v. Ocean Steamship Co.* (1884)).

General
Average

The law applicable to apportionment is generally determined by the agreement of the parties; but if not, that of the port of destination of the ship prevails. Reference has already been made (pages 354, 357, *ante*) to the provisions of the Marine Insurance Act, 1906, with regard to general average, and it is only necessary here to mention a set of rules, known as the York-Antwerp Rules, 1924. These rules, which were drawn up to render the practice in general average uniform, are becoming generally adopted in contracts of affreightment and marine insurance policies. The York-Antwerp Rules are framed in order that the parties, if they choose to adopt them by way of contract, may not be troubled with any question as to what general law is to apply (*Vlassopoulos v. British & Foreign Marine Insurance Co.* (1929)).

York Antwerp
Rules

The question of the effect as between shippers *inter se* of a stipulation that the York-Antwerp Rules shall govern the liability in respect of general average is thus referred to in Carver's *Carriage of Goods by Sea*,

Seventh Edition, at page 513: "Such a stipulation (i.e. that certain rules shall govern liability) is binding as between each shipper and shipowner; but unless the shipowner is also considered to contract on behalf of all the other shippers or unless an agreement of the shippers *inter se* can be inferred from their knowledge that the bills of lading will contain such a provision, it would seem that as between one shipper and another, the ordinary rules of law on the subject must prevail."

Conditions
requisite for
general
average

In order that general average may arise there must have been —

- (a) A loss incurred intentionally,
- (b) The avoidance of a danger common to the interests of all parties,
- (c) An absolute necessity for some sacrifice to be made,
- (d) The preservation of the ship and some portion of the cargo, and
- (e) No default on the part of the person whose interest has been sacrificed.

Particular
average

In contradistinction to "general average," there is the term "particular average" to be found in policies of marine insurance. This means any loss occasioned through damage to the ship or cargo, which is not for the benefit of all parties, or which has arisen through accident. Loss of an anchor, damage to goods by seawater, and the falling of goods overboard are examples of these. Losses of this kind remain where they fall, and must be borne by the owners of the goods or by the insurance companies. Compensation for delay cannot be claimed as general average, because the loss is common to all parties interested, so that damage by loss of time may be considered proportionate to the interests, and be left out of consideration (*The Leitrim* (1902); (*Wetherall v. London Assurance* (1931))).

Definition

Salvage. This is a reward or compensation paid by the shipowner, or by the owners of goods carried in the ship, for extraordinary services performed at sea, whereby the ship or the goods are saved from shipwreck or other loss. It arises out of an implied contract

whereby the shipowners undertake to give a reward to the salvor or salvors in consideration of special services rendered. Sometimes the word is also used to designate the property which has been saved.

To entitle the salvors to reward it must be shown that the work was performed voluntarily (*Akerblom v. Price* (1881)), that the ship (*Wells v. Gas Float Whitton* (1897)), or goods were saved from loss, and that without such services they would most probably have been lost. There is no claim for salvage for saving of human life, unless there is property saved at the same time and the claim to salvage must be enforced against that property. The passengers and crew of the vessel saved, whatever their exertions may have been, and pilots, are not, as a general rule, entitled to salvage. The reasons for withholding reward for salvage services in the case of the crew or passengers are very obvious; to allow compensation of this kind might in fact lead to the gravest dangers. The whole question is lucidly and admirably dealt with by Lord Stowell in the case of *The Neptune* (1824).

Requisites of claim for salvage

No salvage for saving human life

Jurisdiction in all matters of salvage is now vested in the Admiralty Division of the High Court of Justice. The salvor can enforce his claim to compensation for his services by means of arrest in virtue of his maritime lien (*infra*) upon the thing saved. In certain cases, where the value of the property saved does not exceed £1,000, where the amount claimed does not exceed £300, and where the parties consent, proceedings may take place in a county court possessing Admiralty jurisdiction.

Jurisdiction in respect of salvage

Maritime Lien. A lien, that is, a possessory lien, is a right on the part of a person who has come into the possession of goods to retain them until certain charges are paid. A maritime lien is not a lien in this sense; it does not depend upon possession. It is defined by Lord Tenterden as "a claim or privilege on a thing to be carried into effect by legal process" (see *per* Jervis, C.J., in *The Bold Buccleugh* (1852)). It is a peculiar right which attaches to a ship in connection with a

Maritime lien defined

liability arising out of an adventure at sea, and attaches to the ship wherever she may be. It is enforceable by arrest and sale, if necessary, at the instance of the Admiralty Court. In addition to liens arising out of salvage and bottomry bonds, there are those which attach for damage through collisions, seamen's wages, and payments made by the master on account of the ship. As a general rule maritime liens for services rendered rank in the contrary order of their attachment, i.e. the last in time of attaching is paid first. Liens arising out of such matters as collisions rank in the order of their attachment. The lien for wages of seamen has priority over all other liens. Wages earned before a salvage lien attaches are, however, postponed to that lien.

PART VII

SELECT CASES

CONTRACT

NECESSITY FOR INTENTION TO CREATE LEGAL OBLIGATION

Balfour v. Balfour, [1919] 2 K.B. 571

AN agreement is not a contract unless it contemplates legal relations. The ordinary arrangements between husband and wife are therefore not contracts. See page 8 ante.

The plaintiff sued the defendant (her husband) for money which she claimed to be due in respect of an agreed allowance of £30 a month. The parties were married in 1900. The husband had a post as civil engineer under the Government of Ceylon, where they lived until 1915. The husband's leave was up in 1916, but the doctor advised the wife to remain in England a few months longer for health. A parole agreement was made that he should give her £10 a month. There was no suggestion of a separation until later. She obtained a decree nisi and an order for alimony in 1918. The husband was not made liable on the alleged contract.

"There are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts."

AGREEMENT SUBJECT TO APPROVAL OF FORMAL CONTRACT

Winn v. Bull (1879), 7 Ch.D. 29

See page 15,

When an agreement is made "subject to the preparation and approval of a formal contract," the contract comes into existence only when the formal contract is approved by both parties.

The plaintiff agreed to let the defendant have a certain dwelling-house on lease, allowing him the first year's rent "to be laid out by him in substantial repairs to the property," the signed agreement ending, "This agreement is made subject to the preparation and approval of a formal contract."

When the formal lease came the defendant objected that it contained conditions not contemplated by him, he refused to take the lease in that form, and the plaintiff brought his action for specific performance of the agreement. The plaintiff failed, the Master of the Rolls saying—

"I am of opinion there is no contract. The principle is clear. If in a proposed sale or lease of an estate two persons agree to all the terms and say, 'We will have the terms put into form,' then there is a contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, then there is no contract, because all the terms have not been settled. It comes to this: where you have a proposal made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared."

OFFER AND INVITATION TO OFFER

See page 16,
ante.

Spencer v. Harding (1870), L.R. 5 C.P. 561

There is a distinction between *offers* and undertakings to *consider offers*.

The defendants advertised for tenders for a bankrupt stock. The advertisement was rather awkwardly couched: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade." Spencer made a tender which was not accepted. Nor was any other. Upon his suing the defendants it was held that the advertisement "was a mere proclamation that the

defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them."

**OFFER TO INDIVIDUALS GENERALLY—ACCEPTANCE
BY CONDUCT**

Carlill v. Carbolic Smoke Ball Company, [1892] 2 Q.B. 484; [1893] 1 Q.B. 256

The company advertised that anyone using their smoke balls according to the instructions would not contract influenza, or if he did the company would pay him £100 reward. The advertisement also stated that £1,000 had been deposited with a bank as security.

See pages 16
and 20, *ante*.

Mrs. Carlill used the ball as directed, but contracted influenza and sued the company for the reward.

The company was held liable. It was argued that Mrs. Carlill should have sent a written acceptance to the company, but the advertisement was considered to be a general offer, and specific acceptance was not necessary. It was also argued that the offer was not meant to be considered seriously; but the fact that £1,000 had been placed in the bank to "show our sincerity in the matter" was considered by the Court to be enough evidence to prove that the offer was intended to be genuine.

"One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that consensus which is necessary according to the rules of English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so; and I suppose there can be no doubt that where a person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification."

NOTICE TO PARTY OF TERMS OF CONTRACT**Parker v. S.E. Railway Co. (1876), 2 C.P.D. 416**

See page 18,

A person is subject to written conditions in a contract even though he has not read them, provided that his attention has (actually or by implication) been drawn to them.

The plaintiff had deposited a bag in a cloak-room and received a paper ticket on which was printed various information and the words "See back." On the back were clauses relating to articles left, the company stating that it would not be responsible for any package exceeding the value of £10. Parker presented his ticket but his bag could not be found. He claimed £25 and the company in accordance with their condition offered £10.

"The question then is, whether the plaintiff was bound by the conditions contained in the ticket. In an ordinary case, where an action is brought on a written agreement which is signed by a defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. If, in the course of making a contract, one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them and does not know what they are.

"I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."

REVOCATION OF OFFER—CONTRACTS BY POST**Byrne v. Van Tienhoven (1880), 5 C.P.D. 344**See pages 19
and 22, *ante*.

Where the post is the normal medium of communication between the parties, an acceptance is complete as soon as it is posted. A revocation of an offer is not effective until actually communicated.

The defendants carried on business at Cardiff and the plaintiffs at New York—it took ten or eleven days for a letter posted at either place to reach the other. The alleged contract consisted of a letter written by the defendants on the 1st of October, 1879, and received by the plaintiffs on the 11th. It was accepted by telegram and letter on the 11th and 15th October respectively. The defendant made an offer of 1,000 boxes of a particular brand of tinplates, 14 in. by 20 in. at 15s. 6d. per box f.o.b. here, with 1 per cent for commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to a cable on or before the 15th inst. here. The acceptance by telegram was sent on 11th October, 1879, and confirmed by letter on the 15th. These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. On the 8th October the defendants wrote and sent by post a letter revoking their offer of 1st, the reason being that there had been a panic in the tinplate market suddenly and prices had fallen by about 25 per cent. This letter reached the plaintiffs on the 20th October

"There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. For the decision of the present case, however, it is necessary to consider two other questions, viz.—

"1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent?

"2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

"It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even although it never reaches its destination.

"When, however, the authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he had made the post office his agent to receive the acceptance and notification of it. But this principle appears to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs

to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th October is to be treated as communicated to the plaintiffs on that day or on any day before the 20th when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion, the withdrawal by the defendants on the 8th October, of their offer of the 1st was imperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn."

CAPACITY OF PARTIES—ALIENS

Porter v. Freudenberg, [1915] 1 K.B. 857

See page 26,
ante.

Civil rights depend upon place of residence, not upon nationality nor legal domicile.

The question was to what extent the King's Courts are open to alien enemies.

"When considering the enforcement of civil rights, a person may be treated as the subject of an enemy state notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State. Alien enemies have no civil rights or privileges, unless they are here under the protection and permission of the Crown. An alien enemy cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm. But the subject of an enemy State who is registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy State, is entitled to sue in the King's Courts. This decision is, in our opinion, clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country and has been allowed thereafter to remain here. He is *sub protectione domine regis*.

"The alien enemy can be sued. It follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice; and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice. Equally it seems to result that, if judgment proceed against him, the Appellate Courts are as much open to him as to any other defendant."

CAPACITY OF PARTIES—FOREIGN SOVEREIGNS

Mighell v. Sultan of Johore, [1894] 1 Q.B. 149

The King's Courts have no jurisdiction over the ruler of a sovereign state unless, of his own volition, he submits himself to that jurisdiction. See page 26, ante.

Action was brought to recover damages for breach of promise of marriage, and to recover a pair of diamond buckles or their value. The defendant, while residing in this country, observed a strict incognito, and was known under the name of Albert Baker. He had under that name made a proposal of marriage to the plaintiff, which she had accepted. The defendant took out a summons to set aside the writ, alleging that the Court had no jurisdiction over him, as he was an independent sovereign. His assertion was confirmed by the Colonial Office. The Court held him to be exempt from suit.

"What is the time at which a foreign sovereign can be called upon to elect whether to submit to the jurisdiction of the Courts of this country or not? It must be taken to be at the time when the Court is asked to exercise authority over him, and not at any previous time. If, when the Court cites him or is about to cite him, he is in a position to prove, by the assent of the sovereign of this country, that he is an independent sovereign, it is then for him to say whether or not he will submit to the jurisdiction of the Court. If he does not submit, then the Court has no jurisdiction over him."

CAPACITY OF PARTIES—INFANT PARTNER

Lovell & Christmas v. Beauchamp, [1894] A.C. 607

An infant cannot be made bankrupt. This is so even when the firm of which he is a partner has a receiving order made against it. The order proceeds against the members, "other than the infant." But, unless within a reasonable time of his reaching the age of twenty-one the infant repudiates the partnership agreement, he becomes fully liable as a partner. See pages 28 and 130, ante.

The House of Lords decided that an infant can be a partner and can enjoy the benefits of the partnership only by bearing its burdens—

"There is nothing to prevent an infant trading, or becoming partner with a trader. Till he disaffirms the contract of partnership he is a member of the trading firm. But he cannot contract

debts by such trading ; although goods may be ordered for the firm he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for, no part of them shall be received by the infant partner. This right of the adult partner can be made available for the benefit of the creditors."

CAPACITY OF PARTIES—INFANT'S NECESSARIES

Nash v. Inman, [1908] 2 K.B. 1

See page 29,
and

A tradesman can recover a reasonable price for goods supplied to an infant only when he can show that these goods were—

1. Suitable to the infant's station in life.
2. Were not in excess of his actual requirements at the time.

At the time of sale and delivery of the goods the defendant was an infant. He had been at school at Uppingham and in October, 1902, went to Trinity College, Cambridge.

The clothes supplied by the tailor were valued at £145 10s. 3d., including 11 fancy waistcoats at 2 gns. each.

Upon the application for judgment under Order XIV the defendant pleaded infancy. The judge held that there was no evidence to go to the jury that the goods were necessities and directed judgment to be entered for the defendant.

Under the Infants Relief Act, 1874, all contracts for goods supplied are absolutely void, the only exception being for necessities.

"The plaintiff sues for goods sold and delivered. The defendant pleads infancy. The plaintiff must then reply, 'The goods sold were necessities within the meaning of the definition in section 2 of the Sale of Goods Act, 1893.' It is not sufficient, in my view, for him to say, 'I have discharged the onus which rests upon me if I simply shew that the goods supplied were suitable to the conditions of life of the infant at the time.' There is another branch of the definition which cannot be disregarded. Having shewn that the goods were suitable to the condition in life of the infant, he must then go on to shew that they were suitable to his actual requirements at the time of the sale and delivery."

**CAPACITY OF PARTIES—INFANTS—
MISREPRESENTATION OF AGE****R. Leslie, Ltd. v. Sheill, [1914] 3 K.B. 607**

An infant is not liable for a fraud whereby he induces another to enter into a contract with him. See page 30, ante.

An infant is liable for the wrongs he commits. But a plaintiff cannot treat a breach of contract as a wrong so as to make the infant liable. The wrong must be independent of the contract. Fraud, in order to induce the other party to enter upon the contract, is not such a wrong as can make the infant liable.

The plaintiffs were a firm of registered money-lenders. They sued the defendant on the ground that the defendant had obtained two advances of £200 by fraudulently misrepresenting his age; they claimed £475 as the principal and interest.

"Where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract. It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through.

"The whole current of decisions shows that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud. Restitution stopped where repayment began. The money was paid over in order to be used as the defendant's own, and he has so used it and spent it. There is no question of tracing it, no possibility of restoring the very thing got by fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources; in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so."

**CAPACITY OF PARTIES—MARRIED WOMAN—
JUDGMENT AGAINST**

Scott v. Morley (1887), 20 Q.B.D. 120

See pages 33,
34, *ante*.

Married women cannot be committed to prison for debt, except in respect of contracts made before marriage.

Judgment against a married woman proceeds only against her separate estate.

Julia Morley, the wife of Samuel Morley, appealed against an order upon a judgment summons that she should be committed to prison for six weeks for non-payment of £291 11s. 9d., the amount of the plaintiff's judgment debt and costs. She succeeded in her appeal.

"When an Act is dealing with the liberty of the subject we ought to be very careful not to read into it words which are not to be found there, and which would derogate from the liberty of the subject. Now s. 5 of the Debtors Act gives power to commit a person who makes default in payment of any debt due from him. Can it be said that, when a judgment directs a sum to be paid out of a married woman's separate property, it creates a debt 'due from her,' as to which she can make default in payment? In my opinion, if we were so to hold, we should be straining the language of s. 5. The debt is only payable out of her separate property."

**CAPACITY OF PARTIES—MARRIED WOMAN—
NECESSARIES**

Debenham v. Mellon (1880), 5 Q.B.D. 394; 6 App. Cas. 24

See page 35,
ante.

Marriage does not of itself imply authority in the wife to pledge her husband's credit for goods other than necessities; and, even where necessities are in question, a husband escapes liability upon showing either that he provided the necessities or has given his wife an adequate allowance to provide them.

Mellon had given his wife an ample allowance for clothes; he forbade her to pledge his credit. Debenham, who had no previous dealings with her, supplied goods upon her husband's credit; Debenham failed to recover the price.

"It is urged that it is hard to throw upon a tradesman the burden of inquiring into the fact of a wife's authority to buy necessities upon her husband's credit. I assent to the answer

that while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted and in respect to which even after such advertisement he may be made liable to a tradesman who is able to swear that he never saw it."

**CAPACITY OF PARTIES—MARRIED WOMAN—
NECESSARIES**

Seaton v. Benedict (1828), 5 Bing. 28

Goods were supplied to Mrs. Benedict; and, though the goods were like those of the jovial pedlar, "Lawn as white as driven snow; Cyprus black as e'er was crow; gloves as sweet as damask roses; Masks for faces and for noses," they satisfied one requisite of what the law calls "necessaries." For they were reasonably suitable for the station in life of the buyer. But they did not satisfy the other requisite. They were in excess of her actual requirements at the time; for Mr. Benedict had always been generous in his dress allowance. The goods were not necessities; and Mr. Benedict had done nothing to give the trader cause to think that the buying was with his approval. The confiding trader was, therefore, unable to obtain payment, the Lord Chief Justice's comment being—

See page 35,
ante

"It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife."

**CAPACITY OF PARTIES—COMPANY—BEFORE
INCORPORATION**

Kelner v. Baxter and Others (1866), L.R. 2 C.P. 174

The plaintiff, a wine merchant, was proprietor of the Assembly Rooms at Gravesend. It was proposed that a company should be formed for establishing an hotel at Gravesend, to be called "The Gravesend Royal Alexandra Hotel Company, Limited." The company was to purchase the premises of the plaintiff for a sum of £500, of which £300 was to be paid in cash, and £200 being paid up in shares, the stock, etc., to be

See page 39,
ante.

taken at a valuation. This was carried into effect; the defendant Baxter being the nominal purchaser on behalf of the company.

On the obtaining of the certificate of incorporation the directors ratified the arrangement. The company having collapsed, Kelner sought to make Baxter and the other directors liable. He succeeded. It was urged that, as the defendants entered into the agreement only as agents they were not personally liable; and that, even if they were at first liable, the subsequent ratification by the company exonerated them. Their contention was rejected.

"Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done—by a person in existence; either actually, or in contemplation of law, as in the case of assignees of bankrupts, and administrators, whose title vests by relation . . . The company never could be liable upon this contract: and, construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the person signing it would be personally liable. Putting in the words 'On behalf of the G.R.A. Hotel Company' would operate no more than if a person should contract for a quantity of corn 'On behalf of my horses.'"

CAPACITY OF PARTIES—PERSON OF UN SOUND MIND

Imperial Loan Company, Ltd. v. Stone, [1892] 1 Q.B.
599

See page 39,
ante.

The defendant signed a promissory note as surety. Subsequent to the signing he was found by inquisition to be a lunatic. The jury could not agree upon the question whether the insanity was known to the plaintiffs' agent.

"When a person enters into a contract, and afterwards alleges that he was insane at the time and that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

"The burden of proof must lie on the defendant; the jury have disagreed on a material question in the cause, and as there is no finding on that question the case must go back for a new trial."

**FORM AND CONSIDERATION—STATUTE OF FRAUDS
—CONTRACTS NOT TO BE PERFORMED WITHIN
A YEAR**

Peter v. Compton (1694), Skin. 353

If the contract contemplated may be wholly performed within a year, the Statute of Frauds does not apply. See page 46,
ante.

Peter appeared to be a confirmed bachelor. Compton jestingly said, "If you will give me a guinea now, I will give you 1,000 guineas on your wedding day." Peter said, "Agreed," and paid the guinea. Two years later Peter married and claimed the 1,000 guineas. Compton based his defence upon the Statute of Frauds, which requires written evidence to make enforceable an *agreement that is not to be performed within the space of one year from the making thereof*. The Court held, however, that as it did not appear from the agreement that it was to be performed after the year, writing was not necessary.

**FORM OR CONSIDERATION—CONSIDERATION
MUST BE OF VALUE**

Bainbridge v. Firmstone (1838), 8 A. & E. 743

Consideration is needed before the Court will enforce a promise not under seal; but the consideration may be quite trifling, provided it is something the law will recognise. See page 51,
ante.

Bainbridge owned two boilers. Firmstone asked to weigh them, undertaking to return them in as good a condition as when lent. He took them to pieces for convenience of weighing; he returned them in pieces; in spite of his assertion that he obtained no consideration for his promise, he was held liable to make good the damage.

"The consideration is that the plaintiff, at the defendant's request, allowed the defendant to weigh the boilers. I suppose the defendant thought he has some benefit; at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time."

**FORM OR CONSIDERATION—CONSIDERATION
MUST MOVE FROM PROMISOR**

Tweddle v. Atkinson (1861), 1 B. & S. 393

See page 54,
ante.

A man cannot acquire rights by a contract to which he is a stranger.

Tweddle, junior, married Guy's daughter. Tweddle, senior, and Guy agreed together each to give a marriage portion. After Guy's death, Tweddle, junior, sued the Executor for the sum promised. The Court held that he had no right of action.

"The modern cases show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but the argument ought also to make the son liable upon it. By reason of the principles which now govern the action of *assumpsit*, the present action is not maintainable."

**LEGALITY—COURT WILL NOT HELP EITHER
PARTY TO AN ILLEGAL CONTRACT**

Scott v. Brown, [1892] 2 Q.B. 724

See page 55.

If a contract is illegal, no Court of Law will help either party to the contract.

Scott and McNab made a bargain for the buying of shares in a company, the object of the bargain being the wish to create in the public mind the idea that a market existed for the shares. McNab, though employed as a broker to buy shares at a premium, transferred his own shares to the plaintiff. Scott sought rescission of the contract. Neither party alleged that the contract was one incidental to "market-rigging," to an attempt to mislead the public. But upon its becoming clear that such was the purpose of the bargain, the Court declined to interfere.

"*Ex turpi causa non oritur actio* (No right of action can arise from a base cause). This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the

Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant as adduced by the plaintiff proves the illegality, the Court ought not to assist him. The correspondence put in evidence by the plaintiff in support of the claim he made at the trial shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract."

**LEGALITY—PUBLIC POLICY—PENALTY OR
LIQUIDATED DAMAGES**

Kemble v. Farren (1829), 6 Bing. 141

When in a contract a sum is named as payable in the event of breach the Court will enforce payment of the sum only if it is an agreed estimate of the damage that will follow from the breach. It will not enforce it when the sum is a *penalty* and not *liquidated damages*.

See page 58,
ante.

Farren agreed to act at Covent Garden Theatre for four consecutive seasons, and to conform to all the regulations of the theatre; Kemble promised to pay him £3 6s. 8d. for every night during those seasons that the theatre should be open for performance and to give him one benefit night in each season. For a breach of any term of this agreement by either party, the one in default promised to pay the other £1,000, and this sum was declared to be "liquidated and ascertained damages and not a penalty or penal sum or in the nature thereof." Farren broke the contract, the jury put the damages at £750, and the Court refused to allow the entire sum of £1,000 to be recovered.

"If, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case,

would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty appears to be a contradiction in terms."

LEGALITY—RESTRAINT OF TRADE

Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Co., Ltd., [1893] 1 Ch. 630; [1894] A.C. 535

See pages 60
61 *ante*.

A contract, though in restraint of trade, is enforceable if fair and not against public policy; where there is a sale of goodwill the Court will normally enforce the agreement, provided it is not too wide, in consideration of all the circumstances of the bargain.

The appellant covenanted: "The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, or in any business competing or liable to compete in any way with that for the time being carried on by the company."

The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

"In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void. In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of everyday occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases.

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

"I think that the restraint in the present case is reasonable in every point of view, and therefore I agree that the appeal should be dismissed."

**LEGALITY--RESTRAINT OF TRADE--EMPLOYER
AND EMPLOYEE**

Herbert Morris, Limited v. Saxelby, [1916] A.C. 688

An employer may by contract restrain his employee from divulging trade secrets and from soliciting his old customers. But he cannot prevent the employee from earning his living by the exercise of his skill and the use of his knowledge.

See page 69,
ante.

The sole question at issue was as to the enforceability of the covenant entered into by the respondent with the appellants. The appellants were engineers specializing in the manufacture and sale of lifting machinery for which they had acquired a great reputation. Their head office and works were at Loughborough and they had branch offices in the large towns. They had devoted much money and time to collecting and tabulating various information for use in their business. A number of charts contained technical information resulting from experiments made by the firm. The respondent on leaving school entered into the employment of the appellants as a junior draftsman. Later he was promoted and agreed that: "The employee shall not during his employment nor at any time afterwards divulge nor communicate to any person, corporation, or firm any information which he may receive or obtain in relation to the company's affairs and customers, and

all instructions, drawings, notes, and memoranda made by the employee, or which may come into his possession while engaged as aforesaid shall be the exclusive property of the company." He also had to covenant that he would not engage in any work concerning the same manufacturing process for seven years after leaving their employment. The respondent left the appellants' service and entered into the employment of Vaughan & Sons, Limited, of Manchester, who were manufacturers of lifting machinery and competitors in trade of the appellants. The appellants then commenced action against the respondent, claiming injunctions.

The House of Lords refused the injunction.

"The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability ensure to the injury of the purchaser.

"It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained."

LEGALITY—RESTRAINT OF TRADE—EMPLOYER AND EMPLOYEE

Vincent v. Reading v. Fogden (1932), 48 T.L.R. 613

Fogden had been a salesman for the plaintiffs; and one clause in his engagement contract stipulated that "for

three years from the termination of this agreement" he would not compete, or help to compete, with the plaintiffs "within fifteen miles of Station-square, Reading."

The Court decided that the particular restrictive undertaking need not have been observed by the defendant.

The Court's decision was based upon the principles—

"1. One who seeks to enforce a restriction must show that it goes no further than is reasonably necessary for the protection of his business.

"2. An employer must not take from the employee a covenant protecting the employer, after the cessation of the employment, from the competition of his former servant.

"Here the defendant had not acquired any information of a confidential character. The restrictive clause was, therefore, unenforceable and void."

LEGALITY—RESTRAINT OF TRADE—COMBINATIONS

Mogul Steamship Co. v. McGregor, Gow & Co. (1889),
23 Q.B.D. 598, affirmed, [1892] A.C. 25.

No action lies against a trader for competing even by ways that are meant to harm his rival. See page 65
ante

The plaintiffs, who were shipowners engaged in the tea-carrying trade between China and England, alleged that the defendants had injured them by entering into a conspiracy to prevent their vessels from being employed by shippers in Chinese ports to carry their cargoes to London. It was proved that the defendants had offered a special discount to those exporters who employed them alone; and also had organised a plan for sending steamers of their own to meet any vessel sent to Hankow by the plaintiffs and to underbid it, even by accepting rates of freight so low as to be unremunerative; and, further, had forbidden their agents, on pain of dismissal, to act as agents for the plaintiffs.

Lord Justice Bowen made the following remarks—

"All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future. And until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or

that law courts had a right to say to them in respect to their competitive tariffs 'Thus far shalt thou go, and no further.'"

LEGALITY—RESTRAINT OF TRADE—COMBINATIONS

North Western Salt Co. v. Electrolytic Alkali Co.,
[1914] A.C. 461

See page 65,
ante.

A contract in restraint of trade may be enforceable if not in conflict with public interest.

The appellants were a combination of salt manufacturers. They included substantially all the salt manufacturers in north-west England. They made a contract with the respondents whereby they bought a stipulated amount of salt each year, their object being to control supply and so regulate prices. The respondents agreed not to sell salt otherwise than as agreed. In breach of the contract they sold to customers other than the combination; the combination discovered the sales, and claimed damages.

The House of Lords awarded damages.

The Appeal Court had held the contract illegal as being in restraint of trade, and as forming part of a scheme for securing a monopoly by restricting output and raising prices.

But the Lord Chancellor said—

"Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement.

"The competition between salt producers within the area covered by the agreement of September may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition."

**LEGALITY—GAMING AND WAGERING—STOCK
EXCHANGE TRANSACTIONS**

In re Gieve, [1899] 1 Q.B. 794

A contract on the "cover" system for payment of "differences" is a contract by way of gaming or wagering. As such it is void by the Gaming Act, 1845. It is none the less so where there exists an option to demand delivery or acceptance of the actual stocks.

See page 68
ante.

The trustee in bankruptcy of Gieve succeeded in his appeal against a creditor, Moss, who claimed against the bankrupt in respect of Stock Exchange transactions.

**LEGALITY—MONEY PAID FOR ILLEGAL PURPOSE—
RECOVERY**

Taylor v. Bowers (1876), 1 Q.B.D. 291

Where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods.

See page 69,
ante.

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

POSSIBILITY—SUBJECT-MATTER NON-EXISTENT

Couturier v. Hastie (1856), 5 H.L. Cas. 673

When there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void (i.e. of no legal effect).

See page 70,
ante.

A cargo of corn, supposed by both of the parties to be on the way from Salonica to England, was no longer in existence when the parties made their agreement for a sale. Before the date of the sale the shipmaster, finding the corn heated and in danger of taking fire, had unloaded it at Tunis and sold it for what it would fetch. The buyer was not liable for the price.

"It plainly imports that there was something to be sold, and something to be purchased, whereas the object of the sale had ceased to exist."

MISTAKE OF FACT**Scott v. Coulson**, [1903] 2 Ch. 249

See page 71,
ante.

The question was whether the sale of a life policy of insurance was valid. At the date of the contract both parties supposed the assured to be alive. In fact the assured was dead. The plaintiffs had accepted, as the best price they could get for the policy, a sum slightly in advance of its surrender value, but much below the sum due on the assured's death.

They claimed, therefore, to have the contract declared void; and the Court did so.

"It is clear that the subject-matter of the contract was a policy still current with a surrender value, and that the subject-matter did not exist at the date of the contract."

MISTAKE OF FACT**Smith v. Hughes** (1871), L.R. 6 Q.B. 597

See page 72,
ante.

A man may not make or accept a promise, when he knows that the other party understands it in a different sense from that in which he understands it himself. But a man is under no legal obligation to undeceive a self-deceiver.

Hughes, a horse-trainer, obtained a sample of oats from Smith. Hughes wanted old oats and thought, from the sample, that the oats offered were old. He bought them; but on learning that they were new oats he refused to accept them. The Judge in the lower court considered Hughes to be justified in refusing. But on appeal the Court of Queen's Bench sent the case for a new trial: Smith could recover if he had known that Hughes thought he was buying old oats; Smith could not recover if he had known that Hughes thought he was being promised old oats. The burden was upon the defendant to show that Smith knew this.

"In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought, though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was

guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

MISTAKE—RECOVERY OF MONEY PAID UNDER

Marriott v. Hampton (1797), 2 Sm. L.C. 441

When a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed, the law will not allow him to try in a second action what he might have set up in the defence to the original action.

See page 72,
ante.

H. brought action against M. for goods sold. 'M. had paid but had mislaid the receipt. Having no evidence of payment he paid again. M. afterwards found the receipt, and he brought action for money had and received. The Chief Justice ruled that, after the money had been paid under legal process, it could not be recovered, however unconscientiously retained by the defendant. His ruling was confirmed on appeal.

"I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused; but this goes much further."

MISTAKE AS TO NATURE OF CONTRACT

Foster v. Mackinnon (1869), L.R. 4 C.P. 704

In order to make a bill more readily saleable Callow tricked Mackinnon, a gentleman far advanced in years, into endorsing a bill of exchange. The defendant saw only the back of the bill and was persuaded that he was signing a guarantee such as he had previously signed. Foster had obtained the bill in the ordinary course of business, and was, therefore, a holder in due course. It was held, however, that Mackinnon was not liable on his indorsement unless it could be shown that he was negligent.

See page 75,
ante.

"It seems plain, on principle and on authority, that, if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

MISREPRESENTATION—MUST BE INTENTIONALLY FALSE

Dickson v. Reuter's Telegram Co. (1877), 3 C.P.D. 1

See page 75,
ante.

The plaintiffs were merchants at Valparaiso; the defendants were a telegraph company.

The plaintiffs received at Valparaiso a telegraphic message which they reasonably understood to be a direction to ship barley to England; but the message was not intended for the plaintiffs. The mis-delivery was caused by the negligence of the defendants or their agents. On receiving the telegram, the plaintiffs proceeded to execute the supposed order; and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs by reason of the shipments sustained a serious loss; and they claimed that the defendants' company should reimburse them for that loss.

"The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false."

FRAUD—GENERAL RULE

Derry v. Peek (1889), 14 App. Cas. 337

See pages 77,
and 78, *ante*.

To sustain an action for fraud the false statement must be shown to be made with an actual disregard of truth, or else recklessly, careless whether it be true or false.

A company obtained a special Act authorising it to

make and work tramways: with the consent of the Board of Trade the power might be steam power. Consent was expected as a matter of course, and the directors in their prospectus said: "The company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that this will result in a considerable saving in the working expenses." The Board of Trade did not, in fact, give its consent, and ultimately the company was wound up.

Peek, relying as he said upon the statements in the prospectus, invested money in the company and lost it. He sued the directors for deceit; but, though judgment went in his favour at first, the House of Lords decided against him.

"An action of Deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. Then, however honestly the misrepresentation was made, the contract cannot stand. In an action of deceit something more must be proved to cast liability on the defendant. There must be proof of fraud. And fraud is proved when it is shewn that a false representation has been made: (1) Knowingly; or (2) Without belief in its truth; or (3) Recklessly, careless whether it is true or false.

"Making a false statement through want of care falls far short of and is a very different thing from fraud; and the same may be said of a false representation honestly believed, though on insufficient grounds."

FRAUD—REMEDIES FOR—MUST ACT PROMPTLY

Clarke v. Dickson (1858), E.B. & E. 148

The fact that a contract is induced by fraud does not render the contract void. It merely gives the party defrauded a right, on discovering the fraud, to elect whether he will treat the contract as binding or disaffirm it. But he must act promptly; for his right to avoid the contract will be lost if third parties acquire rights under it.

See page 79,
ante.

Plaintiff bought shares, held them for some time, and received fresh allotments of shares in lieu of dividends declared. The company was wound up; and during the process of winding up, the plaintiff found that the representations upon which he had bought the shares were fraudulent.

He claimed recovery of the deposits paid on the shares, but was non-suited; and on appeal the non-suit was affirmed.

"When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in such a situation as to be able to put the parties into their original state before the contract. Now here he might at one time have had a right to restore the shares and demand the price for them. But then what did he buy? Shares in a partnership with others. He cannot return those; he has become bound to those others. The plaintiff must rescind *in toto* or not at all; he cannot both keep the shares and recover the whole price. That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying live cattle, killing them, and even selling the meat to his customers. If the rule of the law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice. The true doctrine is that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition."

UNDUE INFLUENCE AND DURESS—ACQUIESCENCE

Allcard v. Skinner (1887), 36 Ch.D. 145

See page 80,
ante.

The law presumes, where one person stands in a position of authority or trust in respect of another, and receives a benefit from the person subject to that authority, that the benefit is the result of undue influence. The gift is voidable within a reasonable time after the influence ceased; but it may be acquiesced in.

This was an action to recover money and railway stock alleged to have been transferred by the plaintiffs to the defendant, Miss Skinner, whilst subject to undue influence. Miss Skinner was the lady-superior of a sisterhood of ladies, who devoted themselves to works of charity. The plaintiff joined the sisterhood and conformed eagerly with its rules. She made a will in favour of Miss Skinner and made her gifts of money exceeding £7,000. After about eleven years the plaintiff left the sisterhood. She revoked the will made

in Miss Skinner's favour, but made no claim for the return of the money until over six years later. The Court held that her continued acquiescence, after she had left the sisterhood, was such a ratification of the gifts as to make them not now revocable.

"If her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief, that the gift is to lie where it has laid, then, by estoppel, the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel. During five years she has had the opportunity of reflecting upon what she has done, she was surrounded by persons perfectly competent to give her proper advice. I draw unhesitatingly the inference that she did consider this matter and determine not to interfere with her previous disposition."

OBLIGATIONS OF THIRD PARTIES

Lumley v. Gye (1853), 2 E. & B. 216

It is an actionable wrong to interfere, without legal justification, with a contract. See page 85, ante.

Lumley, manager of an opera house, engaged Miss Wagner to sing in his opera house and nowhere else. Gye, a rival manager, induced Miss Wagner to break her contract with Lumley. Lumley was held to be entitled to damages against Gye.

"A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."

CONSTRUCTION OF CONTRACT

Hart v. Standard Marine Insurance (1889), 22 Q.B.D. 499.

The terms of a contract are to be understood in their plain, ordinary sense, unless by the known usage of trade they have acquired a special sense. See page 88, ante.

The action was brought on a marine policy containing the clause, "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." On the voyage where a partial loss occurred there was, besides iron, a quantity of steel, so that the registered tonnage was exceeded. The underwriters declined to pay, on the ground that there had been a breach of the

warranty. They were held justified in their refusal, since *steel* was within the intended meaning of iron.

"In an affirmative description of some subject-matter the mind inclines to be specific; but in the case of exclusion the mind naturally tends to the use of general terms. In this case, which is one of exclusion, there is no evidence which tends to cut down or restrict the ordinary and general scope of the words. Therefore, for the purposes of this warranty 'iron,' in its wide and general sense, includes that which is described specifically as 'steel.'"

CONSTRUCTION OF CONTRACT

Steinman v. Angier Line, [1891] 1 Q.B. 619

See page 88,
ante.

The words of a contract are construed more strongly against him whose words they are, than against the other party.

In the charter-party one excepted-risk clause protected the shipowners from liability for losses due to "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea." Losses occurred through thefts by the stevedore's men employed in loading. The Court held that the clause did not cover such losses.

"The question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers, by sea as well as land, viz., That words of general exception from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. An ambiguous document is not a protection."

ASSIGNMENT—EQUITABLE

Wm. Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.,
[1905] A.C. 454

See page 91,
ante.

K. & Co., rubber merchants, sold to Dunlops a parcel of rubber. This they had bought by help of an advance from the plaintiffs, who are merchant bankers. K. & Co. undertook that the price of the rubber should be paid direct to the plaintiffs, and in fact sent to Dunlops a written request to remit to the plaintiffs. Through some confusion in Dunlop's offices this request was not complied with; the price was paid to another banking house from which K. & Co. had had advances.

Ultimately the plaintiffs sued Dunlops for the price; and the House of Lords allowed their claim.

"It is difficult to conceive a plainer case of an equitable assignment, or a clearer case of notice to the debtor. Dunlops receive through Brandts a notice which no man of business could mistake, telling them, on Kamrisch & Co.'s express authority, that they are to pay to Brandts the money which they owe their creditors, Kamrisch & Co. What more could be required? Dunlops disregard that notice; and pay the wrong people. They must pay the money over again."

"The language of an equitable assignment is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril."

ASSIGNMENT OF CONTRACTS—PERSONAL CONTRACTS

British Waggon Co., and the Parkgate Waggon Co. v. Lea
(1880), 5 Q.B.D. 149

1. Voluntary liquidation does not of itself incapacitate a company from fulfilling a contract. See page 92

2. A company fulfils its obligations by finding a new company (assignee of the contract) able and willing to do the routine work.

By an agreement in writing of the 10th February, 1874, the Parkgate Waggon Co. let to the defendants, who are coal merchants, railway waggons, undertaking to keep them in repair.

The Parkgate Company passed a resolution for the voluntary winding up of the company. They assigned and transferred, and the liquidators confirmed, to the British Co. and their assigns, among other things, all sums of money then due or thereafter to become due to the Parkgate Co. On the execution of this assignment the British Co. took over from the Parkgate Co. the repairing stations used for the repair of the waggons let to them and also the staff of workmen. The British Co. was ready and willing to execute all necessary repairs to the said waggons.

In this state of things the defendants asserted their right to treat the contract as at an end on the ground that the Parkgate Co. had incapacitated themselves from performing the contract by going into voluntary

liquidation and by assigning the contracts and repairing stations to the British Co., between whom and the defendants there was no privity of contract, so that the defendants were not bound to accept their services.

"We entirely concur in the principle on which the decision in *Robson v. Drummond* rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work."

DISCHARGE OF CONTRACT—ACCORD AND SATISFACTION

Foakes v. Beer (1884), 9 App. Cas. 605

See page 98,
under.

1. A gratuitous promise is void unless under seal.
2. Payment of a smaller sum is, even if so agreed, no good satisfaction of a larger sum.

The respondent had obtained judgment for £2,000 odd. The appellant asked for time to pay it and the respondent agreed to accept £150 every half year till the debt was paid in full. The appellant paid according to the agreement. The respondent now sought the interest to which she was entitled under the judgment. The Court admitted the claim.

"The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine laid down by all the judges of the Common Pleas in *Pinnel's Case* in 1602, but to treat an agreement, not under seal, for satisfaction of a debt, by a series of payments on account, to a total amount less than the whole debt, as binding in law, provided those payments are

regularly made; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors.

"The doctrine itself, as laid down by Coke, may have been criticised by some persons whose opinions are entitled to respect, but it has never been judicially overruled. On the contrary, I think it has always, since the sixteenth century, been accepted in law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years."

**DISCHARGE OF CONTRACT—PAYMENT OF
SMALLER SUM THAN SUM DUE**

Welby v. Drake (1825), 1 C. & P. 557

Though the payment of a smaller sum in discharge of a larger sum is no good discharge, even if agreed upon by the creditor, yet, if the payment is in any way different from what the creditors could have insisted upon, the debt is fully discharged.

See page 99,
ante.

Drake owed Welby £15 3s. 11d. Welby agreed that if Drake's father paid £9 he would accept it in full satisfaction. £9 was paid and Welby unsuccessfully sued for the balance.

"If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability."

**DISCHARGE OF CONTRACT—PAYMENT OF
SMALLER SUM THAN SUM DUE**

Pinnel's Case (1602), 5 C. Rep. 117

Pinnel brought action against Cole upon Cole's bond to pay a penalty of £16 for the non-payment of £8 10s. Cole pleaded that, *at the instance of the plaintiff and before the day on which the debt was due*, he had paid £5 2s. 2d. which the plaintiff had accepted in full satisfaction of the £8 10s.

See page 99,
ante.

"And it was resolved by the whole court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk, or robe, etc., might be more beneficial to the plaintiff

than the money, in respect of some circumstance; or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment can the acceptance of parcel be a satisfaction to the plaintiff. But in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it, before the day, would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster, and you request me to pay to you £5 at the day in York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole. For the expenses to pay it at York is sufficient satisfaction. But in this case the plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by the law he ought), but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it. And for this cause judgment was given for the plaintiff."

The plaintiff had the verdict here, that is, not on the merits of the case, but simply because of an error in the defendant's pleading. The defendant should have pleaded that he had paid in full satisfaction, and that the plaintiff had accepted in full satisfaction. For the anticipatory payment was consideration. Doubtless, the gaining of a suit on a mere technical error would be almost impossible in these days.

DISCHARGE OF CONTRACT—BREACH BEFORE TIME FOR PERFORMANCE

Frost v. Knight (1872), L.R. 7 Ex. 111

See page 103,
ante.

Knight promised the plaintiff to marry her on the death of his father. The father still being alive, Knight announced his intention of not fulfilling his engagement. The plaintiff at once brought her action. She was held entitled to do so.

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party

as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time; subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

**DISCHARGE OF CONTRACT--BREACH--MEASURE
OF DAMAGES**

Hadley v. Baxendale (1854), 9 Exch. 341

An extraordinary loss cannot be recovered in the event of a breach of contract unless such extraordinary loss was in the contemplation of both parties at the time of making the contract. See page 104.

The plaintiffs carried on an extensive business as millers at Gloucester. Their mill was stopped by a breakage of the mill shaft, and it became necessary to send the broken part to Messrs. Joyce & Co., the engineers, at Greenwich, as a pattern

Pickford & Co. undertook to carry the shaft. Their servant said that if the shaft was delivered any day before noon it would be delivered at Greenwich on the following day. The shaft was delivered, and the money was paid for its carriage. The delivery of the shaft at Greenwich was delayed by some neglect, and the plaintiffs received the new shaft later than they should have done, and the working of the mill was delayed, and they lost profits by it.

The defendants objected that these damages were too remote and that they were not liable with respect to them. The jury found a verdict with £25 damages beyond the amount paid into Court. On appeal a new trial was ordered, the instruction being given that on these facts the loss of profits must not be taken into account in estimating the damages.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such

as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

DISCHARGE OF CONTRACT—BREACH—MEASURE OF DAMAGES

See page 105. **Hammond & Co. v. Bussey** (1887), 20 Q.B.D. 79

Damages recoverable are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.

Defendant was a coal merchant. Plaintiffs were shipping agents at Dover. The defendant knew that the plaintiff supplied "steam-coal," and he sold coal warranted fit for use in steamships. The plaintiffs resold it with the same warranty. A claim was made against the plaintiffs by their sub-vendees in respect of the bad quality of the coal. Before the trial the defendant reiterated that the coal was of the description specified in the contract.

The jury awarded damages against H. & Co. B. was willing to pay these damages, and paid the amount into court. Plaintiffs claimed also the cost of defending the action. It was this amount that was in dispute. Bussey was held liable.

"The defendant knew for what purpose the plaintiffs were purchasing the coal, viz. to resell to the owners of steamers,

and he must have known as a business man what damages might naturally result to the sub-vendees if it was not reasonably fit for the purposes of steamships, and therefore could not be used by the sub-vendees for such purposes. He may therefore be reasonably supposed to have contemplated, if the warranty were broken, that claims for damages would be made against the plaintiffs by the sub-vendees, and also, if he thought about it, he must have known that the plaintiffs, if such claims were made, would be the sub-vendees who had tried the coal insisting that it was bad and incapable of being used as steam-coal, and that they had in consequence sustained damage; on the other side would be the defendant, who knew more about the origin of the coal than the plaintiffs did, and who might refuse to be bound by any action they might take with regard to the sub-vendees' claims and assert that such action was unreasonable."

**DISCHARGE OF CONTRACT—PERSONAL SERVICE—
REMEDIES FOR BREACH**

Whitwood Chemical Company v. Hardman, [1891] 2 Ch. 428

If an agreement involving personal service is broken the employer's only remedy is an action for damages: he cannot obtain an injunction. See page 106, ante.

The defendant was the company's manager, the contract between them containing the clause, "The said manager shall give the whole of his time to the company's business." There was no negative contract. The defendant, still being in the plaintiff's services, became interested in and helped a rival enterprise.

The Appeal Court refused the injunction sought.

"If he is committing a breach of the agreement, he is doing that which is wrong in point of law; but that is not the question. The question is as to the plaintiff's remedy by injunction. The plaintiffs are not disposed to avail themselves of the first two remedies [of dismissal and of an action for damages]. They want an injunction.

"We are dealing here with a contract involving the performance of a personal service, and, as a rule, the Court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained in *Lumley v. Wagner*—that where a person has engaged *not* to serve any other master, or *not* to perform at any other place, the Court can lay hold of that, and restrain him from so doing.

"But what injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement?"

NOTE. In *Lumley v. Wagner* (1852), 1 De G.M. & G. 604, Miss Wagner agreed to sing in L's theatre, and *not to sing* at any other theatre during the existence of the contract. When she broke it, the Court would not grant specific performance, but granted an injunction in respect of the negative stipulation, which was here express. The correctness of this decision has been much discussed, and in *Rely-a-Bell Fire Alarm Co. v. Eisler*, [1926] W.N. 125, it was stated that an injunction would not be granted in respect of an express negative stipulation where it would, in effect, prevent the former employee from earning his living.

DISCHARGE OF CONTRACT - FRUSTRATION OF OBJECT

Baily v. De Crespigny (1869), L.R. 4 Q.B. 180

See page 113,
and.

Subsequent impossibility excuses only when we may reasonably assume a term is the original contract to that effect. Such a term may well be that both parties shall be discharged from their obligations if the sovereign power makes the contract incapable of performance.

Baily leased land from De Crespigny. The latter retained the adjoining land and undertook that neither he nor any one to whom he assigned the land would erect on it other than ornamental buildings. A Railway Company, under powers conferred by their Railway Act, took the land and erected station buildings upon it. Baily sued De Crespigny; but it was held that, since the Railway Company was an assignee that De Crespigny could not control, he was excused.

"The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."

AGENCY**UNDISCLOSED PRINCIPAL—NO RIGHT TO SET-OFF
AGAINST—FOR DEBT DUE FROM AGENT****Cooke v. Eshelby** (1887), 12 App. Cas. 271.

There is no right of set-off against an undisclosed principal for a debt due from the agent. See page 132
ante.

In April and June, 1883, Livesey Sons & Co., cotton brokers at Liverpool, sold to Isaac Cooke & Sons, on the Liverpool Cotton Market, cotton for future deliveries. Livesey Sons & Co. made these contracts in their own names, but were really acting as agents for Maximos, their undisclosed principal. The result of this transaction was that a sum of £680 was due from Isaac Cooke & Sons to Livesey & Co. For this sum an action was brought against Isaac Cooke & Sons by Eshelby as trustee in the liquidation of Maximos, who had failed. The defendants by their defence claimed to set off, against the plaintiff's claim, money due from Livesey and Sons & Co. to the defendants upon a general account. In answer to the plaintiff's interrogatories whether in the transactions sued on the defendants did not believe that Livesey & Co. were acting as brokers on behalf of principals the defendants said: "We had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals." Messrs. Cooke failed in their claim.

"A sale by a broker in his own name does not imply that he is selling on his own account; on the contrary it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot, when the real principal comes forward, allege that the broker sold the cotton as his own.

"He has no right to set off his indebtedness to the principal against debts owing to him by the agent."

SECRET LIMITATIONS ON AGENT'S POWERS**Howard v. Sheward** (1866), L.R. 2 C.P. 148

Sheward employed his brother to sell a horse to Howard. He gave his brother instructions not to See page 136,
ante.

warrant the horse. The brother did, however, warrant it; and Howard, finding the horse to be unsound, sued Sheward for breach of warranty. Howard obtained damages. For the buyer was justified in supposing that the agent had instructions to warrant the horse—

“The ostensible authority could not be negated by showing a secret understanding between the horse-dealer and his agent.”

MISREPRESENTATION BY AGENT

Polhill v. Walter (1832), 3 B. & Ad. 114

See page 139,
ante.

A person is liable for fraudulent misrepresentation even if his motive is good.

A bill had been drawn upon Walter's former partner. The bill was left for acceptance; and, when the payee called for it, Walter said that the drawee was out of town, and that the bill had better be presented again. The payee refused, and said he would protest the bill. Thereupon Walter, wishing to save trouble and expense, accepted the bill *per procuration* of the drawer. The drawee on being told expressed regret at Walter's action and refused to pay the bill. The plaintiff, who had received the bill in the ordinary course of business, sued Walter and obtained payment.

“If the defendant, when he wrote the acceptance (thereby representing that he had authority from the drawee) knew he had no such authority, the representation was untrue to his knowledge; and an action will lie against him by the plaintiff for the damage sustained in consequence. The defendant, no doubt, believed that the acceptance would be satisfied, and the bill paid when due. If he had done no more than make a statement of that belief he would have been blameless. But then the bill would never have circulated as an *accepted* bill.”

BREACH OF AGENT'S WARRANTY OF AUTHORITY

Collen v. Wright (1857), 7 E. & B. 310; 8 E. & B. 647

See page 139,
ante.

A person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue.

Wright was land agent for Gardner. He agreed with plaintiff to lease a farm of Gardner's. On the strength of the agreement Collen entered on the farm. Gardner refused a lease; he had given Wright no authority to agree to a lease for so long a term. Collen's suit for specific performance against Gardner was dismissed with costs.

The executors of Wright, who had died during the proceedings, were held liable to Collen.

"The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence in no way alleviates the inconvenience and damage. A person, professing to contract as agent for another, undertakes impliedly, if not expressly, to the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact, exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed, the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter."

**AGENCY—BREACH OF WARRANTY OF AUTHORITY
—LUNACY OF PRINCIPAL**

Yonge v. Toynbee, [1910] 1 K.B. 215

The lunacy of a principal terminates the authority of the agent. See pages 35,
140, 142, *ante*.

The solicitors for the defendant, Toynbee, had received instructions for defending an action brought by Yonge. The solicitors continued to act when their client had been certified insane. Though they had no knowledge of the insanity (and consequently of the automatic ending of their authority to act), they were held liable to pay the plaintiff whatever costs he had incurred since the insanity. For they had, by implication, affirmed that their authority to act continued.

"Where an agent represents that he has authority to do a particular act, and he has no such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. In the conduct of litigation the Court places much reliance upon solicitors, who are its officers. It issues writs at their instance, and accepts appearances for defendants, which they enter as a matter of course and without

questioning their authority. The other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side. Much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed authority."

PARTNERSHIP

WHO IS A PARTNER?

Cox v. Hickman (1860), 2 H.L.C. 268.

See page 145,
ante.

It was formerly supposed that any one sharing, in however small a degree, in the profits of a partnership, became responsible as one of the partners. A different test governs now. That a man shares in profits is strong evidence of his being a partner; but he will be a partner only if he has a direct and principal interest in the business.

Smith and Co., iron merchants, became insolvent. They and their creditors executed a deed of arrangement. The deed assigned all their property to five trustees of whom Cox was one. The trustees were to manage the works and conduct the business. Cox never acted in the business. One of the other trustees accepted bills of exchange in the name of the company for iron ore supplied by Hickman.

Was Cox liable as a partner on their bills? The House of Lords said "No." For—

"The real test of Partnership liability is not participation in the profits, but whether the trade is carried on by persons acting as the agents of the persons sought to be made liable."

COMPANIES

COMPANY DISTINCT FROM MEMBERS

Salomon v. Salomon & Co., Ltd., [1897] A.C. 22

See pages 143,
170 and 172

The appellant, Aron Salomon, for many years carried on business on his own account as a leather merchant and wholesale boot manufacturer.

With the design of transferring his business to a joint stock company to consist of himself and his family, he entered into an agreement on 20th July, 1892, with a trustee for the future company settling the terms of the

transfer, one of the conditions being that in part payment he was to receive £10,000 in debentures of the company. 20,001 shares were held by Salomon and six shares by his family. The intention throughout was to retain the business in the family and not to admit strangers. At the time of its transfer to the company the business was perfectly solvent.

The company lost heavily. A liquidator was appointed for the unsecured creditors. A balance of about £1,055 remained, and Salomon claimed this as debenture holder. In the two lower courts judgment was in favour of the liquidator against Salomon, the Court of Appeal considering that—

“The formation of the company and the issue of the debentures to Salomon were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets by means of such debentures.”

But the House of Lords reversed the decision.

“It was essential to the artificial creation constituting a company that the law should recognise only that artificial existence, quite apart from the motives of the incorporators. Once formed, the company must be treated like any other independent person; but assuming for the sake of argument that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company, it did not follow that this was contrary to the intention of the Companies Act, which apparently gives a company a legal existence with its own rights and liabilities independently of the ideas of those who formed it.

The Lords Justices had considered the inexpediency of permitting one man to be practically the whole of the company. And assuming that such a thing could not have been intended by the Legislature they had sought in the Act some prohibition of such a result. But the question of policy was immaterial if the company had been duly constituted by law; and there was nothing in the evidence to show that Salomon intended to do anything dishonest. The judgment of the Court of Appeal should be reversed.”

MEMORANDUM OF ASSOCIATION—ULTRA VIRES ACTS

Ashbury Carriage Co. v. Riche (1875), L.R. 7 H.L. 653

A corporation which is a limited liability company, being an artificial person created by law, is restricted in

See page 177,
ante.

its powers. Its powers are restricted to what are given to it at its creation, or what may be reasonably deduced from these. Acts beyond these powers are beyond its capacity (*ultra vires*). So far as the corporation is concerned these acts give no rights and involve no liabilities.

The company was formed to make carriages, including locomotives. It entered into contract with Riche that he should do work in connection with the construction of a railway line. Riche performed his part of the contract. The company did not pay. He sued, but failed. For the construction of a railway is not incidental to the building of carriages: the *memorandum of association* took power to do the second; it took no power to do the first.

"The question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company has been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make; which we authorise the directors to make; to which we sanction the placing of the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing."

ARTICLES OF ASSOCIATION—ACTS OF MANAGER PERMITTED BY

British Thomson-Houston Co. v. Federated European Bank, Ltd., [1932] 2 K.B. 176.

See page 180
and.

This case illustrates effectively the distinction between the Articles of Association, knowledge of which is assumed, and the internal management of the company.

The plaintiffs sued and recovered on a guarantee in this form: "The Federated European Bank, Limited, 21 Soho Square, London, W.1. 11 June, 1931. To the

British Thomson-Houston Co., Ltd., Rugby. In consideration of your supplying or continuing to supply goods to Harris Williams (Servis), Ltd., of 180, Albion Road, Stoke Newington, London, N.16. We hereby guarantee the payment of your account with them up to the sum of £200 (two hundred pounds) for three months from the date hereof, and you are at liberty to give any time or indulgence to the said Harris Williams (Servis), Ltd., for the whole or any part of your account without discharging us. The Federated European Bank, Ltd. (Signed) N. Pal."

The writ was specially endorsed, and the plaintiffs issued a summons for leave to sign final judgment under Order XIV. In answer to the summons the manager of the defendant company stated in an affidavit that the company had not executed the guarantee, as any guarantee by them had to be executed by two directors. The Master gave leave to defend; decision went against the bank, the bank appealed, but failed.

"It appeared from the articles of association that the board had power to delegate to any manager or other officers the powers conferred on the directors, other than the powers to borrow and make calls. Delegation of the power to give guarantees had not in fact occurred. But the plaintiffs urged that they had no concern with the way in which the bank managed their affairs within the powers conferred by the articles. If you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power."

And this contention was accepted by the Court of Appeal.

"Those who have dealings with a company are affected with notice of all that is contained in its memorandum and articles of association. These confer upon the directors two powers—

"1. To delegate to one or more of their number any of the powers of the board of directors.

"2. To decide who shall sign contracts and other documents on the company's behalf. *Royal British Bank v. Turquand* decided that, if persons dealing with a company find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are released from the duty of further inquiry, and are entitled to assume that the power has been regularly and duly conferred."

LIABILITY OF PERSONS ISSUING PROSPECTUS**New Brunswick Railway Company v. Muggeridge**
(1860), 1 Dr. & Sm. 381

See pages 183,
188, *ante*.

Full disclosure is called for in a prospectus. But a rescission of a contract to take shares can be obtained only by showing that an omission in the prospectus is misleading.

"Those who issue a prospectus holding out to the public the great advantage which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

PROSPECTUS TENDING TO DECEIVE**Aarons Reef v. Twiss**, [1896] A.C. 273

See page 184,
ante.

If the tendency of the prospectus as a whole is to deceive, there is no need, in order to claim rescission of a contract to take shares, to show that certain specific statements are untrue.

"I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together. Looking at the whole document, nobody can doubt that this was a fraudulent conspiracy. One or two of the learned judges below remarked upon the fact that Mr. Gilbert, who seems to have been the head and front of it, was not submitted to an inquiry in a criminal court. It is said there is no specific allegation of fact which is proved to be false. That is not the true test. Taking the whole thing together, was there false representation? I do not care by what means it is conveyed, by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If, by a number of statements, you intentionally give a false impression and induce a person to act upon it, it is not the less false although, if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."

SALE OF GOODS**GOODS AND SERVICES DISTINGUISHED****Lee v. Griffin** (1861), 1 B. & S. 272

When, in carrying out a contract, skilled labour has been expended or something sold, the transaction is still a sale of goods. And if the thing is valued at £10 or more, there must be a note or memorandum (signed by the defendant) to make the contract enforceable. See page 231, ante.

Artificial teeth costing £21 were supplied. There was no note sufficient to satisfy the Statute of Frauds. The dentist failed to recover the price. If the contract had been one for the hire of services, there would have been no impediment to recovery.

"I do not think that the test to apply in these cases is whether the value of the work exceeds that of the materials used in its execution. For, if a sculptor was employed to execute a work of art, greatly as his skill and labour, supposing it is to be of the highest description, might exceed the value of the marble on which he worked, the contract would be nevertheless for the sale of a chattel."

SALE FOR PARTICULAR PURPOSE**M'Alister v. Stevenson**, [1932] A.C. 562.

The maker of goods, when he sends them out in the form in which the ultimate buyer will consume them, is under a duty of care even though this ultimate buyer makes no direct contract with him. See page 238, ante.

The appellant was a shop-girl. The respondent was an aerated water manufacturer from whom she claimed, and at length obtained, £100 as compensation for shock and illness. Her friend had bought her a bottle of ginger beer in a Paisley shop. She drank part of the contents before discovering that there was a dead snail in the bottle. The discovery gave her a shock and this, together with the contaminated drink, caused her illness.

Lord Atkin made the following statement—

"A manufacturer put up an article of food in a container, which he knew would be opened by the ultimate consumer. There could be no inspection by the purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allowed the contents to be mixed

with poison. It would be a grave defect in the law if the poisoned consumer had no remedy against the negligent manufacturer. I confine myself to articles of household use—soap, ointment, cleaning powder. Every one, including the manufacturer, knew that the articles would be used by other persons than the actual purchaser—by members of his family, or his servants or his guests. I do not think so ill of our law as to suppose it to deny a legal remedy where there is so obviously a social wrong."

WHEN PROPERTY PASSES

Tarling v. Baxter (1827), 6 B. & C. 360

See page 247,
ante.

Baxter agreed in writing with Tarling to sell a stack of hay, then standing in a field at Islington, for £145. Payment was to be made in a month's time, but the stack could remain till May Day. The seller stipulated that it was not to be cut till paid for. Before it was removed an accidental fire destroyed it. The loss was held to fall on the buyer, who must pay the contract price, since at the time of agreement the property had passed to him.

"The rule of law is that where there is an immediate sale, nothing remaining to be done by the vendor, the property in the thing sold vests in the vendee. Then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls on the vendee."

TRANSFER OF TITLE—*NEMO DAT QUOD NON HABET*

Cundy v. Lindsay (1878), 3 App. Cas. 459.

See page 242,
ante.

A man can give only such rights as he himself has over goods (*Nemo dat quod non habet*).

Alfred Blenkarn hired a room in a house in Wood Street, Cheapside; the plaintiffs, Messrs. Lindsay & Co., linen manufacturers in Belfast, received a letter from Blenkarn purchasing goods, mainly handkerchiefs.

The name was signed without an initial, and was written so as to appear as Blenkiron & Co. A well-known firm of Blenkiron & Son were also carrying on business in Wood Street, the plaintiff being under the impression he was contracting with them, sent the goods. Blenkarn sold the fraudulently obtained goods to Messrs. Cundy who were *bona fide* buyers and resold

them in the ordinary course of business. Blenkarn's fraud was soon discovered, and he was convicted and sentenced at the Central Criminal Court. The plaintiffs then brought an action against the defendants—Messrs. Cundy—for unlawful conversion of the handkerchiefs.

"My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but, if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Co. to the applications for goods. I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever."

NOTE. In *Phillips v. Brooks*, [1919] 2 K.B. 243, a person entered a shop and bought goods on credit, declaring he was a person of eminence, well known by repute to the shopkeeper. He sold the goods to a third person, and it was held the shopkeeper could not recover them as he had intended to contract with the person before him, whom he identified by sight and hearing. That is to say, there was a contract, though voidable, and as third parties had acquired rights under it, it was too late for the shopkeeper to repudiate. In *Lake v. Simmons*, [1927] A.C. 487, on the other hand, a woman went into a jeweller's shop and represented she was the wife of X, who had commissioned her to

purchase a necklace. X was well known to the jeweller, who intended to deal with the woman only as the wife and agent of X. Accordingly, when she absconded and pledged the necklace with Y, it was held that there was no contract as the jeweller intended to contract with X only. In consequence the jeweller was held (following *Cundy v. Lindsey*) entitled to recover. In this case, as in *Cundy v. Lindsey*, the contract was void, not voidable.

SALE IN MARKET OVERT

Hargreave v. Spink, [1892] 1 Q.B. 25

See page 243,
ante.

There is no sale "in market overt" when the goods are sold in the City of London in a show-room over the shop, to which customers are admitted only by special invitation. Nor does it seem, in spite of the custom of market overt in the City of London, that "market overt" applies where the shopkeeper is the buyer, not the seller, of goods.

The plaintiff owned jewellery, which was stolen from her. The defendants are silversmiths and jewellers. They bought the jewellery *bona fide* from a person who brought it to their business premises for sale, and under circumstances which would entitle them to keep the stolen property if the sale to them was made to them in market overt. The defendant's place of business is within the City of London. It consists of a shop in the ordinary acceptance of the term. Behind the counter is a staircase leading to a show-room on the first floor. The person who brought the jewellery for sale explained her business, and was thereupon taken into the upper room where the purchase was effected.

"By the custom of London every shop in which goods are exposed publicly to sale is market overt for such things only as the owner professes to trade in. But by no reasonable stretch of language can the showroom be called a shop. Publicity is required in the transaction to bring it within the principle of a sale in market overt.

"Moreover, sales effected in a shop to a shopkeeper stand upon a footing differing in substantial respects from sales by the shopkeeper."

STOPPAGE IN TRANSITU—MISDELIVERY

Verschure's Creameries v. Hull & Netherlands S.S. Co.,
[1921] 2 K.B. 608.

If the consignor stops goods in transit and the carriers deliver them to the consignee, the consignor has choice of two courses; he can sue the carrier for conversion, obtaining as damages the value of the goods; or he can adopt the transaction and rely on his contractual rights against the consignee. But the consignor must elect the course of conduct, and is bound by his election.

See pages 239
and 299 *ante*

The plaintiffs had delivered goods to the defendants for carriage to Hull and thence to Manchester. At Hull the plaintiffs instructed the defendants not to deliver; but through some confusion the goods were delivered to the customer. The plaintiffs then invoiced the goods to the customer, sued him, and recovered judgment. The judgment being unsatisfied, the plaintiffs sued the defendants for negligence and breach of duty.

The Court of Appeal held that, as the plaintiffs had treated the delivery as an authorized delivery, they could not now treat it as a misdelivery.

"The owners of the goods might have sued for conversion. They sued in contract and thereby waived the tort. A party cannot accept a transaction for one purpose and reject it for another."

STOPPAGE IN TRANSITU—LOSS OF RIGHT

**Cahn and Mayer v. Pockett's Bristol Channel Steam
Packet Co.** [1899] 1 Q.B. 643

A cargo of copper was shipped. The sellers sent to the buyers a bill of exchange to be accepted, and a bill of lading endorsed in blank. The intention was that property should not pass till the bill had been accepted. The buyer was insolvent; he did not accept the bill; contrary to the understanding, he endorsed the bill of lading to the plaintiffs. Such a transfer, the Court of Appeal declared, prevented the unpaid vendors from exercising their right of stoppage in transit.

See page 232,
ante.

(NOTE. The original plaintiffs were Cahn and Mayer, against whom the right of stoppage had been exercised,

and against whom the decision had gone in the lower court. The defendants were the carriers who stopped delivery of the copper upon obtaining an indemnity from the sellers.)

"By sending the bill of lading and the bill of exchange direct to Pinteroher (the bankrupt) Steinmann and Co. (the sellers) constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking. There was no trick which would have negatived a bailment. If he became criminally responsible for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. It would defeat the purpose of the Act, and work a public mischief, if a vendor who had himself placed the bill of lading in the hands of his purchaser were entitled as against a *bona fide* sub-purchaser from the latter to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession. The legislature has deliberately chosen to alter the common law which made a transfer of a bill of lading ineffectual, if the person transferring were not himself the owner of the goods. It has, step by step, enlarged the class of persons who, having possession, may give a better title than they have themselves got, and has relaxed the conditions under which they may do so."

DAMAGES—DUTY TO MITIGATE LOSS

Payzu, Ltd. v. Saunders, [1919] 2 K.B. 581.

See page 254,
ante.

One who is injured by breach of contract must do what is reasonable to mitigate loss.

The defendant, a dealer in silk, bargained to supply the plaintiffs at a specified price with 400 pieces of silk "delivery as required January to September, 1918: conditions 2½ per cent 1 month." Payment, that is, for goods delivered up to the twentieth day of any month should be made on the twentieth day of the following month, subject to 2½ per cent discount. One consignment of silk was delivered; there was some delay in payment; and the defendant, fearing that the plaintiff's financial position did not warrant the giving of credit, asked for cash with each order. This the plaintiffs refused and claimed damages for breach of contract. Now, the ordinary measure of damages, when goods contracted for are not delivered, is the difference between the contract price and the market

price when delivery should have been given. But here, if the defendant's offer to sell for cash had been accepted, the plaintiff would have lost only the discount stipulated in the contract. Was not this smaller amount the measure of damages? "Yes," said the Court—

"The fundamental basis is compensation for pecuniary loss naturally flowing from the breach. But this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage, which is due to his neglect to take such steps."

NEGOTIABLE INSTRUMENTS

WHAT INSTRUMENTS ARE NEGOTIABLE

London Joint Stock Bank v. Simmons, [1892] A.C. 201

Where a document is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it, then it is a *negotiable instrument*. The property in it passes to a *bona fide* transferee for value. See p 258,
ante

A stockbroker had in his hands bonds belonging to Simmons, a client. He fraudulently deposited the bonds with the bank as security for a loan. The bank, unable to obtain repayment of the loan, sold the bonds. Simmons claimed against the bank for their value, on the ground that the stockbroker had no authority to pledge the bonds.

The House of Lords decided in favour of the bank.

"I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them. Of course, if there is any thing to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in

entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting."

BILLS OF EXCHANGE—CAPACITY OF PARTIES— PROCURATION SIGNATURE

Midland Bank v. Reckitt (1932), 48 T L R. 271.

See p 268,
ante

R had created X his attorney for the conduct of R's business during his absence abroad. The attorney, customer of the bank, paid cheques signed "*per pro* R" into his own private account. The Bank neglected to ask by what authority he did so.

On appeal to the House of Lords the Bank was obliged to credit R's account with the amount withdrawn.

"A bank collecting cheques signed by their customer '*per pro*.' under a power of attorney is by the form of signature given notice that the money is not their customer's '*Per pro*' is a notice of limited authority on the face of the cheque. The bank is put upon inquiry and, if it neglects inquiry, it loses the protection of sect. 82 of the Bills of Exchange Act, 1882."

DUTY OF BANKER—CHEQUES—NEGLIGENCE OF CUSTOMER

London Joint Stock Bank v. Macmillan and Arthur, [1918] A C. 777

See pp 285,
289, *ante*

Where a customer's negligence has in effect invited alteration the banker is not liable.

The plaintiffs, Messrs. Macmillan and Arthur, kept a banking account with the defendants, and had in their employment a confidential clerk. He had been with them for some years, and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On 9th February, 1915, one of the partners of the plaintiff firm, Mr. Arthur, was going to luncheon about mid-day and was leaving the office, when the clerk came to him and said that he wanted £2 for petty cash, and produced a cheque for signature. On this occasion the cheque produced for signature contained no words in the

space left for words, but the figures 2.0.0. were in the space left for figures. Mr. Arthur, being in a hurry, signed the cheque in this condition, and the clerk added "one hundred and twenty pounds" in the space left for words and the figures "1" and "0" on each side of the figure "2," thus transforming it into a complete cheque for £120. He presented the cheque for payment, received the money, and absconded. The plaintiffs brought this action for £118, the difference between the amounts of the cheque as authorized and as paid. They failed, however, for the reason stated.

"The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty. It has been often said that no one is bound to anticipate the commission of a crime, and that to take advantage of blank spaces left in a cheque for the purpose of increasing the amount is forgery, which the customer is not bound to guard against. I am unable to accept any such proposition without very great qualification. As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

CARRIAGE

COMMON CARRIER—EXTENT OF LIABILITY

Nugent v. Smith (1876), 1 C.P.D. 423.

A common carrier warrants the safe delivery of goods entrusted to him: apart from special contract he can escape liability for loss or damage only by proving that the loss or damage occurred through *Act of God*, or *Act of the King's enemies*, or *defects in the thing carried (inherent vice)*.

See p 302,
ante

The defendant, a common carrier by sea, received the plaintiff's mare for carriage from London to

Aberdeen. Rough weather was met, the frightened mare struggled, injured itself, and died. Negligence was not proved against the defendant. It was, however, argued that the rough weather was not so unusual as to constitute an *Act of God*, nor the struggling of the mare enough to show that the loss occurred through *inherent vice*. But the Court of Appeal held the defendant free from liability.

"A carrier does not insure against acts of nature and does not insure against defects in the thing carried itself. But in order to make out a defence he must be able to prove that either cause taken separately or both taken together, formed the sole and direct and irresistible cause of the loss. This he has done."

INSURANCE

DISCLOSURE OF MATERIAL FACTS

Ionides v. Pender (1874), L.R. 9 Q.B. 531

See pp 325,
340, *ante*

A contract of insurance is voidable at the option of the insurer when the insured withholds a material fact—such a fact, that is, as underwriters would take into consideration.

Goods were insured upon a voyage much in excess of their real value. The goods were lost and the insurers successfully resisted payment. For, though the over-valuation would not affect the risks of the voyage, yet it was a material fact. The underwriter would weigh it in deciding whether or not to take the risk and what premium he should charge.

"The law as to a contract of insurance differs from that as to other contracts; concealment of a material fact, though made without any fraudulent intention, vitiates the policy."

DISCLOSURE OF MATERIAL FACTS

London Assurance v. Mansel (1879), 11 Ch. D. 363.

See p 325,
ante

The concealment of a material fact in a proposal for life assurance makes the contract voidable.

Mansel, in his request for insurance, answered questions as follows—

Questions.

Has a proposal ever been made on your life at any other office or offices? If so, where?

Was it accepted at the ordinary premium, or at an increased premium, or declined?

Answers.

Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.

At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

He had, however, been refused assurance by other companies; and upon learning this the company returned his premium and sought cancellation of the policy. The Court granted cancellation—

"Here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered; and that the fact which the answer would bring out is not a material fact."

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY

Rogerson v. Scottish Automobile & General Insurance Co. (1931), 48 T.L.R. 17.

Rogerson took out a policy on his car. An added clause provided that the insurance should cover liability of the assured "in respect of the use of any motor-car (other than a hired car) provided that such car at the time of the accident was being used instead of the insured car." While the policy was alive, Rogerson sold the insured car and bought another. He had an accident and became liable to pay compensation. He claimed indemnity; but the defendants refused to pay on the ground that the car was not being used "instead of the insured car." The Appeal Court held the defendants justified in their refusal—

"That seems a very odd clause, because the assured may, if his Baby Austin is laid up through a collision, borrow his friend's Rolls-Royce, a much more dangerous implement than the Baby Austin, and may do a great deal of damage to third parties by the use of the Rolls-Royce; and the insurance

See p 327,
ante

company is willing to undertake that damage without notice and without extra premium.

"But it is quite clear that after the sale of the first car the assured could not make any claim, and nobody else could make any claim, for damage to it. It follows from the ordinary law of insurance that you cannot recover if you have no interest in the subject-matter insured at the time of the loss, either originally or as trustee for anybody else. That is why the assured, if he claimed for damage to the insured car after he sold it, would not recover; he would not recover because he had no interest in the insured property at the time of the loss. At the time of the accident there was, properly speaking, no 'insured car,' and therefore no car being used 'instead of the insured car.'"

**MARINE INSURANCE—RE-INSURANCE—NECESSITY
FOR FORMAL POLICY**

Motor Union Insurance Co. v. Mannheimer Versicherungs-Gesellschaft (1932), 48 T.L.R. 522

See pp 338,
341, *ante*

A reinsurance needs a formal policy in order to be valid.

The arbitrator had decided against the German company, but he submitted a special question to the decision of the court. The question was whether the relation between the parties had been that of principal and agent, or that of insurer and reinsurer. If the first, then the arbitrator's finding was good against the appellants. If the second, then the claim failed owing to the absence of the statutory requirements.

In 1925 the appellants, a German insurance company, carrying on business at Mannheim, wished to undertake marine insurance business in the English market. The appellants, therefore, entered into an agreement with the respondents, the Motor Union Insurance Company. The policies were to be issued in the name of the Motor Union, and ostensibly the business should be Motor Union business.

Policies were issued by the Motor Union in accordance with the agreement, and in course of time heavy losses were incurred. The Motor Union paid the losses and sought to recover over £40,000 from the appellants. The appellants refused to pay; and the claim was referred to arbitration. The arbitrator decided against the German company. At the appeal against the

arbitrator's award, the German company contended that the agreement was in fact one relating to re-insurance. The agency agreement masked the reality. That being so, the claim of the Motor Union must depend upon the existence of a reinsurance policy. No such policy had ever existed and, therefore, the claim could not succeed, owing to the requirements of the Marine Insurance Act. This Act declares that "a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy."

The contention of the appellants prevailed—

"It is a commonplace of the law of agency that an undisclosed principal may sue or be sued upon a contract made on his behalf; but in the case of sea insurance the marine insurance is inadmissible in evidence unless embodied in a marine policy in accordance with the Act, and by Section 23 the policy must specify, among other things, the name or names of the underwriters. Clearly, therefore, as the name of the Mannheim company did not appear in the policies issued in pursuance of the agreement, they could not have intervened as principals so as to sue the assured for a premium, nor could they have been sued for a loss. In either case the absence of the policy subscribed in the name would have been fatal. The Statutes prevent any privity of contract being established between the Mannheim company and the assured by the action or agency of the Motor Union Company, and the latter and they only, in my judgment, are the insurers. Any premiums received were received by them, and any losses paid were paid by them as principals in respect of a liability which was theirs and only theirs. If that be so, it seems to me that any claim they may have against the Mannheim company is not for indemnity against loss sustained as agents, but in the nature of reinsurance.

"I must hold that the claim here is in effect a claim for reinsurance, and so must fail for want of policy."

MARINE INSURANCE—RIGHTS OF INSURER

Young v. Merchants' Marine Insurance Co., [1932] 2 K.B. 705.

If the insured can claim something to mitigate his loss from another than the insurer, then the insurer is entitled to enforce this claim.

The *Whimbrel* was insured against total loss. Attached to the policy there was also a "running-down" clause covering possible claims through collisions. The

See p 358,
ante.

Whimbrel collided with the *Marlock* and became a total loss. Both vessels were held equally liable, the Admiralty rule in such an event being that each vessel bears half of the other vessel's damage. On balance the *Whimbrel* had to make a payment to the *Marlock*, the latter being the more valuable vessel.

The insurers of the *Whimbrel* had reinsured their total loss liability, not their liability under the "running down clause." The reinsurers paid for the total loss, but claimed the nominal amount recovered from the *Marlock*. Their claim was not allowed. The running-down clause is quite distinct from the total loss risk. The reinsurers could, in fact, have gained no advantage under it; for the *Whimbrel* had to pay more than she received—

"The truth is that the shipowner has not received any sum in diminution of this total loss, and, therefore, the liability of the defendant to the shipowner to pay him for a total loss has not in any way been diminished. So the liability of the plaintiff to pay the defendants in full has not been diminished in any way."

SURETYSHIP AND GUARANTEE

GUARANTEE AND INDEMNITY DISTINGUISHED

Birkmyr v. Darnell (1704), 6 Mod. 248.

See p. 361,
note

In a guarantee the guarantor assumes liability only in the event of the primary debtor failing to fulfil his promise. In an indemnity the promisor is to be primarily liable—

"If two come to a shop and one buys, and the other, to gair him credit, promises the seller '*If he does not pay you, I will*, this is a collateral undertaking and void without writing by the Statute of Frauds (i.e. it is a guarantee, which is enforceable only if evidenced by writing). But if he says, '*Let him have the goods, I will be your paymaster*,' or '*I will see you paid*,' this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant (i.e. there is an indemnity, a promise to preserve from loss).

DUTY TO DISCLOSE FACTS TO SURETY

Lee and Another v. Jones (1864), 17 C.B.N.S. 482.

See p. 363,
note.

Packer acted as commission agent for the plaintiffs and much of their money was often in his hands. The

plaintiffs had, as security for his faithfulness, one guarantor. They sought others, and Packer obtained the defendant. On a claim being made in respect of money owing by Packer, the defendant refused to pay on the ground that matters were kept from him that he should have been told when executing the guarantee. Packer's accounts were much in arrear at the time. On appeal the Exchequer Chamber upheld his refusal.

"A surety is, in general, a friend of the principal debtor, acting at his request, and not at that of the creditor; and in ordinary cases it may be assumed that the surety obtains from the principal all the information which he requires. But, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed, that description amounts to a representation, that there is nothing in the transaction that might not naturally be expected.

"The largeness of the sum in arrear; the improbability that the defendant would have become surety if he had known the real facts; the circumstances of the plaintiffs' not having seen the proposed sureties and merely having sent the papers to them were matters entirely for the jury."

RELEASE OF SURETY—FAILURE OF CREDITOR TO OBSERVE CONDITION

**Eshelby v. Federated European Bank, Ltd., [1932] 1 K.B.
254.**

A surety is discharged when the creditor fails to observe a condition of the contract of surety. Thus the measure of promptitude may be stipulated in the contract.

Sec p. 367,
ante.

Two Italians in Soho were turning an old pickle factory into a night club. Eshelby contracted to design and execute work on the building. Payment was to be made in instalments, the conditions being that the work was progressing in accordance with the agreement. The parties to the agreement with the contractor were a company called Olympus, Ltd. (controlled by one of the Italians, Taglioni) and the Bank (of which the other Italian was Managing Director). The principal debtor was Olympus, Ltd., but Taglioni undertook that upon any default for three days or more on the part of the company ("written notice of which shall be given by the contractor to the guarantor within six

days of such default") he would make the payment. The Bank also became surety for Taglioni under similar terms.

Olympus, Ltd., failed to make the stipulated payment. The appellant omitted to give notice within the time stated. Because of such omission his claim upon the guarantors failed, in spite of the fact that in effect the guarantors were the real debtors.

"This is an unsatisfactory case, because the respondents have no merits. The event on which Taglioni has agreed to make the payment is not the default by itself but upon six days' notice of default. The notice is just as much a condition on which Taglioni becomes liable as the default itself is. Inasmuch as the notice was never given there was no default on the part of Taglioni, and therefore the liability of the respondents never came into existence."

BILLS OF SALE

SALE OF GOODS SUBJECT TO BILL OF SALE CONVERSION

Cooper v. Willomatt (1845), 1 C.B. 672.

See p. 389,
ante.

When the hirer of goods sells them he is guilty of a conversion; and so is one who retains them after request by the owner.

Household furniture was conveyed by bill of sale to the plaintiff by one Savage, in consideration of £100. Savage was allowed the use of the furniture for 6s. a week, the agreement being that Cooper should have the furniture on demand. Savage sold to the defendant, a furniture dealer, who bought it in good faith. The plaintiff claimed the furniture and brought action upon the defendant's refusal.

The Court held the defendant liable for conversion.

"I cannot get over the authority of *Loeschman v. Machin*. There, the hirer of certain pianos had sent them to the defendant, an auctioneer, for sale. In an action against the auctioneer, Abbott, J., ruled that 'if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion; and that, if the auctioneer afterwards refuse to deliver he is also guilty of a conversion.' That is a position I am not prepared to dispute. I therefore think the rule for entering a verdict for the plaintiff in this case must be made absolute."

BANKRUPTCY**ACT OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT
OF CREDITORS****In re Phillips**, [1900] 2 Q.B. 329

An assignment for the benefit of one particular class of a debtor's creditors is not an assignment for the benefit of his creditors generally within Sect. 1 (1) (a) of the Bankruptcy Act, 1914. See p. 399,
ante.

P and M were trading as partners and they assigned to a trustee all the "stock in trade, book debts, credits, chattels, and effects belonging or owing to the said firm in connection with their business" upon trust to call in and convert, and, after paying certain expenses and preferential debts to divide the residue among the trade creditors of the firm who were parties to the deed. The property included in the assignment amounted to all the assets of P.

Held: As this was not an assignment for the benefit of creditors generally but only of some creditors, it was not an act of bankruptcy under Sect. 1 (1) (a) of the Act as alleged.

The court pointed out that the assignment was an act of bankruptcy, however, as a fraudulent preference.

"If the words 'creditors' standing alone means 'all the creditors whether joint or separate, the word generally certainly does not limit the meaning of the word creditors. . . . In my view whatever it means, it does not mean 'some.' I, therefore, prefer to say that it means all."

**ACT OF BANKRUPTCY—NOTICE OF INTENTION TO
SUSPEND PAYMENT OF DEBTS****Crook v. Morley**, [1891] A.C. 316

The notice of suspension or of intention to suspend payment of debts which amounts to an act of bankruptcy within Sect. 1 (1) (h) of the Bankruptcy Act, 1914, need not be in any special form as long as it is in terms calculated to convey to the recipients the information that their debtor has suspended or is about to suspend payment of his debts. See p. 403,
ante.

C, a trader, sent the following circular to his creditors :

"Dear Sirs,—Being unable to meet my engagements

as they fall due, I invite your attendance at Guildhall Tavern, Gresham St., City, on Wednesday next at 3 p.m., when I will submit a statement of my position for your consideration and decision. . ."

The House of Lords held that this letter amounted to notice to his creditors that the debtor had suspended or was about to suspend the payment of his debts.

FRAUDULENT PREFERENCE

Exp. Taylor, In re Goldsmid (1886), 18 Q.B.D. 295.

See p. 427,
ante.

In order that an assignment shall amount to a fraudulent preference it must be made "with a view to giving such creditor a preference over the other creditors."

A was employed as a broker by trustees of a marriage settlement to sell some annuities and re-invest the proceeds. A effected the sale and received the purchase money. He also entered into a contract for the purchase of other annuities for re-investment. This purchase was delayed, according to A, through the inability of the jobber to procure the required amount of annuities. On being pressed by one of the trustees to complete the transaction, A confessed he had forged transfers of the securities. The trustee then stated he could not believe his excuse for non-completion of the purchase of the annuities and that unless he immediately handed over the proceeds of the sale he would summon him on a charge of embezzlement. A thereupon gave the trustee a cheque for the proceeds of the sale.

Held not a fraudulent preference.

"If the substantial motive is to prefer the creditor the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference."

ARBITRATION

DUTY TO STATE CASE—OUSTER OF JURISDICTION OF COURT

Czarnikow & Co. v. Roth Schmidt & Co., [1922] 2 K.B. 478.

See p. 454,
ante.

When questions of *law* are in dispute, either party to an arbitration may appeal to the King's Courts.

The parties agreed to submit disputes to the Refined Sugar Association, one of whose rules ran thus: "Neither buyer, seller, trustee in bankruptcy, nor any other person shall require, or shall they apply to the Court to require, any arbitrators to state in the form of a special case. . . ." The arbitrators refused to state a case, but upon appeal to the Court they were obliged to do so. The judgment explains the position very clearly—

"The agreement ousts the jurisdiction of the courts of law, and is consequently against public policy and void. Commercial arbitrations are undoubtedly and deservedly popular. I entertain no doubt so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law administered by the arbitrator is the law of the land and not some home-made law of the particular arbitrator or the particular association."

PASSING OFF

NAME INTENDING TO DECEIVE—OWN NAME

Lyons & Co. v. Lyons (1932), 49 R.P.C. 188.

Deception of the public will be restrained, even when the use of one's own name is the means of deception. See p. 464, ante.

The defendant, keeper of a boarding establishment at Brighton, was registered at first in the name of Sydney Lyons, but changed his name later to Joseph Lyons; his notepaper was headed "Joseph Lyons, Food Specialist"; he sent out canvassers with packets, including packets of tea bearing the label, "J. Lyons' Superior Tea: Brighton Depot: 8d., net weight $\frac{1}{4}$ lb.," very like the plaintiff's packets. The defendant claimed to be entitled to trade under his own name, and denied that he had deceived the public.

It was held, however, that the phrase "Lyons' Tea" and "Lyons' Cocoa" had come to mean the plaintiff's goods. Moreover, "Brighton Depot" was a misleading phrase. The public had been deceived and an injunction was granted.

"The defendant was a scion of the house of Lyons, who at an early age acquired the name of Joseph. He apparently has not been as successful as other members of the family. The more closely a particular surname is associated with a

particular class of goods, the more difficult must it become for another trader happening to own that same name so to use his own name with sufficient distinction as to make it clear to the purchasing public that the goods he is selling are not the goods of the earlier and better-known trader "

COPYRIGHT

WHAT IS A PERFORMANCE IN PUBLIC?

Harms, Ltd., and Chappell & Co. v. Martans Club, [1927]
1 Ch. 526.

See p 487,
ante

The plaintiffs sued the club, a dining and dancing club to which guests might be invited, for performing in public the musical play called "Tip-Toes" In this the plaintiffs had copyright; they had produced it in America but not yet in England. The Court, affirming the judgment of the lower Court, held that the proprietary rights of the plaintiffs had been infringed. For the life of popular songs is usually very short, and premature performance of musical pieces may cause great loss to the copyright owners.

The contention of the defendants was that performance in a club could not be construed as performance in public. For the essential element of clubs is privacy; and the buildings they occupy are private premises. This contention the Court could not adopt—

"There was an entertainment of members, and there were 50 guests, not members of the club. Is it possible to deny that they were properly called members of the public? The persons present would be able to pay for entrance to any public theatre where the play might be performed. I cannot deny that the author was injured. If it were possible to get round the Copyright Act by such a performance, it appears to me that a very serious inroad would have been made upon his property."

MEDIUM WRITING UNDER INFLUENCE OF PSYCHIC AGENT

Cummins v. Bond, [1927] 1 Ch. 167.

See p. 489,
ante.

The plaintiff sought a declaration that she was the owner of the copyright of the *Chronicle of Cleophas*, written by her as a medium under the influence, as she declared, of an external psychic agent. The defendant, who had transcribed and annotated the writing, claimed to be joint author. He based his claim also on the

assertion that his presence was necessary before the psychic being would manifest himself.

Mr Justice Eve gave the plaintiff the declaration she sought—

"So far as this world is concerned there can be no doubt who is the author here; for the plaintiff has written every word of this script. But the plaintiff and the defendant are of opinion that the true originator is some being no longer inhabiting this world, and who has been out of it long enough to justify the hope that he has no reasons for wishing to return to it. It would seem as though the individual, who has been dead and buried for some 1,900 odd years, and the plaintiff ought to be regarded as the joint authors and owners of the copyright. But, inasmuch as I do not feel myself competent to make any declaration in his favour, and recognising as I do that I have no jurisdiction extending to the sphere in which he moves, I think I ought to confine myself, when inquiring who is the author, to individuals who were alive when the work first came into existence, and to conditions which the legislature in 1911 may reasonably be presumed to have contemplated. The defendant invites me to declare that the authorship and copyright rest with someone already domiciled on the other side of the inevitable river. But I can only look upon the matter as a terrestrial one, of the earth earthy, and I deal with it on that footing. The plaintiff has made out her case, and the copyright rests with her."

VERBATIM REPORT OF SPEECH

Walter v. Lane, [1900] A.C. 539.

This case decided that a reporter, though he gives what purports to be a verbatim report of a speech, is yet entitled to the copyright and can assign it. *The Times* reporters were employed on the undertaking that the copyright in all articles and reports composed belongs to *The Times*. *The Times* sought to restrain the defendant from copying the reports, and ultimately obtained the injunction sought. It was urged that a verbatim reporter, however learned, artistic, and accomplished, acts simply as the echo, the mocking bird, the slave of the speaker. But the Lord Chancellor said—

"I should very much regret it, if I were compelled to come to the conclusion that the law permitted one man to make profit by appropriating to himself the labour, skill, and capital of another. Those who preserve the memory of spoken words that are assumed to be of value to the public are entitled to protection. The proof of piracy may be difficult. But that

See p. 490,
ante.

has no bearing upon the existence of piracy. Here there is no difficulty; the defendant's report of these speeches is not the result of independent labour, but is simply taken from *The Times*."

SHIPPING

GENERAL AVERAGE—COMPENSATION FOR DELAY NOT INCLUDED

Wetherall v. London Assurance, [1931] 2. K.B. 448.

See p. 502,
anti

Compensation for delay cannot be claimed as General Average.

The plaintiff's vessel, swerving to avoid a collision, grounded, thereby incurring *particular damage*. Payment for the services of tugs and other measures for preserving the ship and cargo was *general damage*. Repairs of the vessel occasioned loss of profitable employment. Could such a loss be allowed in general average? The Court thought not. Loss consequential on the actual damage, but outside the cost of repair, cannot be recovered. The following extract from the judgment in *The Leitrim*, [1902] p. 256, was adopted by the Court—

"It does not follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should be allowed. A loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of its being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for, where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that the loss of time is common to all the parties interested and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of consideration."

APPENDIX I

Factors Act, 1889

[52 & 53 VICT., c. 45]

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary

1. For the purposes of this Act—

Definitions.

- (1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :
- (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf .
- (3.) The expression "goods" shall include wares and merchandise :
- (4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :
- (5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability :
- (6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Powers of mercantile agent with respect to disposition of goods.

A.D. 1889.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of
pledges of
documents
of title
Pledge for
antecedent
debt.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights ac-
quired by
exchange of
goods or
documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements
through
clerks, &c.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions
as to con-
signors and
consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods

Disposition
by seller
remaining in
possession.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale,

shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. A.D. 1889.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Disposition by buyer obtaining possession.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu. Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

Supplemental

11. For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. Mode of transferring documents.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. Saving for rights of true owner.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act. Saving for common law powers of agent.

(14. & 15. *Repealed by the Statute Law Revision Act, 1908.*)

16. This Act shall not extend to Scotland.

17. This Act may be cited as the Factors Act, 1889. Extent of Act.
Short title.

APPENDIX II

Sale of Goods Act, 1893

[56 & 57 VICr., c. 71]

An Act for codifying the Law relating to the Sale of Goods
[20th February, 1894]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows

PART I

FORMATION OF THE CONTRACT

Contract of Sale

Sale and agreement to sell

1 —(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Capacity to buy and sell

2 Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract

Contract of sale how made

3 Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale for ten pounds and upwards

4 —(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. A.D. 1893.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

Subject-matter of Contract

5.—(1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods." Existing or future goods.

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. Goods which have perished.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. Goods perishing before sale but after agreement to sell.

The Price

8.—(1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Ascertainment of price.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor. Agreement to sell at valuation.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties

10.—(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. Stipulations as to time.

(2.) In a contract of sale "month" means *prima facie* calendar month

A.D. 1893.

When condition to be treated as warranty.

11.—(1.) In England or Ireland—

- (a.) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.
- (b.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract :
- (c.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertaking as to title,

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- (1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- (2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- (3.) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Sale by description.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Implied conditions as to quality or fitness.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

- (1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the

seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :

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- (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- (3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample

15.—(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Sale by sample.

(2.) In the case of a contract for sale by sample—

- (a.) There is an implied condition that the bulk shall correspond with the sample in quality ;
- (b.) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :
- (c.) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II

EFFECTS OF THE CONTRACT

Transfer of Property as between Seller and Buyer

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Goods must be ascertained.

17.—(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Property passes when intended to pass.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rules for ascertaining intention.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :

(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made :

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

**Reservation
of right of
disposal.**

19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

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20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Risk *prima facie* passes with property.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

Transfer of Title

21.—(1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by person not the owner.

(2.) Provided also that nothing in this Act shall affect—

(a.) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22.—(1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

Market overt.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale under voidable title.

24.—(1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

Reverting of property in stolen goods on conviction of offender.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

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Seller or
buyer in
possession
after sale

25.—(1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

Effect of
writs of
execution

26.—(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ, to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III

PERFORMANCE OF THE CONTRACT

Duties of
seller and
buyer.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Payment and
delivery are
concurrent
conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Rules as to
delivery.

29.—(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied,

between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

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(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

Delivery of wrong quantity.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Instalment deliveries.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1.) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

Delivery to carrier.

(2.) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and

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the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Risk where goods are delivered at distant place.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's right of examining the goods.

34.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Acceptance

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Buyer not bound to return rejected goods

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of buyer for neglecting or refusing delivery of goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid seller defined.

38.—(1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

- (a.) When the whole of the price has not been paid or tendered ;
- (b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price. A.D. 1893.

39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law— Unpaid seller's rights.

(a.) A lien on the goods or right to retain them for the price while he is in possession of them ;

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them ;

(c.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding ; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party. Attachment by seller in Scotland.

Unpaid Seller's Lien.

41.—(2.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:— Seller's lien.

(a.) Where the goods have been sold without any stipulation as to credit ;

(b.) Where the goods have been sold on credit, but the term of credit has expired ;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention. Part delivery.

43.—(1.) The unpaid seller of goods loses his lien or right of retention thereon— Termination of lien.

(a.) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(b.) When the buyer or his agent lawfully obtains possession of the goods ;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

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*Stoppage in transitu.*Right of
stoppage in
transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Duration of
Transit.

45.—(1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer.

(6.) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stop-
page in
transitu
is effected

46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller

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47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Effect of
sub-sale or
pledge by
buyer.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48.—(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

Sale not
generally
rescinded by
lien or stop-
page in transi-
tu.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V

ACTIONS FOR BREACH OF THE CONTRACT

Remedies of the Seller

49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

Action for
price.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Damages
for non-
acceptance.

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(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

Damages for non-delivery.

51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Specific performance.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for breach of warranty.

53.—(1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

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Interest and special damages.

PART VI

SUPPLEMENTARY

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

Reasonable time a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

Rights &c. enforceable by action.

58. In the case of a sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale :

Auction sales.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid :

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person : Any sale contravening this rule may be treated as fraudulent by the buyer :

(4.) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

Payment into court in Scotland when breach of warranty alleged.

(60. *Repealed by the Statute Law Revision Act, 1908.*)

61.—(1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

Savings.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

A.D. 1893.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Interpreta-
tion of
terms

62.—(1.) In this Act, unless the context or subject matter otherwise requires—

" Action " includes counterclaim and set off, and in Scotland condescendence and claim and compensation :

" Bailee " in Scotland includes custodier :

" Buyer " means a person who buys or agrees to buy goods :

" Contract of sale " includes an agreement to sell as well as a sale :

" Defendant " includes in Scotland defender, respondent, and claimant in a multiplepounding :

" Delivery " means voluntary transfer of possession from one person to another ;

" Document of title to goods " has the same meaning as it has in the Factors Acts :

" Factors Acts " means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same :

" Fault " means wrongful act or default :

" Future goods " mean goods to be manufactured or acquired by the seller after the making of the contract of sale :

" Goods " include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

" Lien " in Scotland includes right of retention :

" Plaintiff " includes pursuer, complainer, claimant in a multiplepounding and defendant or defender counterclaiming :

" Property " means the general property in goods, and not merely a special property :

" Quality of goods " includes their state or condition :

" Sale " includes a bargain and sale as well as a sale and delivery :

" Seller " means a person who sells or agrees to sell goods :

" Specific goods " mean goods identified and agreed upon at the time a contract of sale is made :

" Warranty " as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

32 & 33 Vict.,
c. 45.
33 & 34 Vict.,
c. 40.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract. A.D. 1893.

(2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

(63. *Repealed by the Statute Law Revision Act, 1908.*)

64. This Act may be cited as the Sale of Goods Act, 1893. Short title.

(SCHEDULE. *Repealed by the Statute Law Revision Act, 1908.*)

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